



**John Kinyanjui Theuri & Kariuki Njuguna T/A Kinyanjui Njuguna & Co Advocates
v Board of Trustees National Social Security Fund (Miscellaneous Application
E751 of 2021) [2023] KEHC 19238 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E751 OF 2021**

FG MUGAMBI, J

JUNE 16, 2023

BETWEEN

**JOHN KINYANJUI THEURI & KARIUKI NJUGUNA T/A KINYANJUI
NJUGUNA & CO ADVOCATES APPLICANT**

AND

**THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY
FUND RESPONDENT**

RULING

1. Before the court is the application dated August 12, 2022 brought under Paragraph 11 of the [*Advocates Remuneration Order*](#). The orders ought in the application are as follows;
 - i. That this Honourable court be pleased to set aside/and/or vacate the decision of the taxing officer delivered on July 28, 2022 in relation to items 1,2 and 39 of the advocate-client bill of costs dated October 5, 2021.
 - ii. That this Honourable court be pleased to remit and/or refer the advocate- client bill of costs dated October 5, 2021 before a different taxing officer for fresh taxation on the disputed items with appropriate directions on how it should be done.
 - iii. That in the alternative this Honourable court be pleased to proceed to tax by itself the advocate-client bill of costs dated October 5, 2021 on the disputed items.
 - iv. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of it, the affidavit of Kinyanjui Theuri and buttressed by the submissions dated December 20, 2022. The applicant's case is that the taxing officer



- made an arithmetic error in calculating legal fees with respect to item 1,2 and 39 and that the ruling failed to consider the value of the subject matter being a claim of Kshs 1,188,000,000/= in Nairobi Court of Appeal Civil Application No 249 of 2014.
3. The applicant further avers that in drastically taxing off the instruction fees and getting up fees the taxing officer failed to consider that the matter was complex and required extensive time and resources to prepare. The taxing officer also taxed off perusal of judgment costs. In any case, the applicant stated that the client was willing to pay Kshs 13,976,500/= as instruction fees.
 4. In opposition to the application the respondent filed a notice of preliminary objection dated October 12, 2022 on the following grounds;
 - i. The costs being sought were for work done in the Court of Appeal
 - ii. The bill of costs dated October 5, 2021 should have been filed in the court of appeal for taxation by the deputy registrar of that court as per the third schedule of the [court of appeal rules 2022](#)
 - iii. The bill of costs dated October 5, 2021 ought to have been struck out as the deputy registrar of the high court lacked jurisdiction to tax the bill.
 5. The client also filed grounds of opposition dated January 19, 2023, the basis of which was that the Deputy Registrar fell into error in determining whether the advocate was instructed by the client to act in the matter. It was averred that this is a matter which should have been determined by the judge and not the taxing officer.
 6. The preliminary objection and the application were canvassed by way of written submissions which I have considered.

Analysis

7. There are two issues for determination. The first issue is whether the preliminary objection is merited and the second issue is whether the advocate had made out a case of setting aside the decision of the taxing officer. By the very nature of a preliminary objection (see *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696), it is deserving that this must be dealt with as a matter of priority.
8. The jurisdiction in question is not the jurisdiction of this court but the jurisdiction of the taxing officer. The respondent submits that the taxing officer lacked jurisdiction to tax the bill since the work done was at the Court of Appeal and should therefore have been taxed by the Deputy Registrar at the Court of Appeal. The respondent cites the case of *Muema Kitulu & Co. Advocates v Kenya Deposit Insurance Corporation* [2016] eKLR, in support of this position. This issue has been a matter of extensive judicial discourse.
9. Firstly, I take the view that this issue ought to have been raised at the first point of contact with the taxing officer. Be that as it may, the [Court of Appeal \(Organization and Administration\) Act](#) provides for the functions of the office of the Registrar of the Court of Appeal which includes taxation of bills of costs under Section 22(1)(n).
10. Paragraph 10 of the [Advocates Remuneration Order](#) (ARO) 2009 also provides for the taxation of bill of costs by the Registrar and Deputy Registrar of the High Court in express terms as follows: -

The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under



Schedule 4 of the order the Taxing Officer shall be the Registrar of trade marks or any Deputy or Assistant Registrar of trade marks.

11. These provisions should be read in conjunction with each other and are not to be confused. The advocate client relationship is regulated by the [Advocates Act](#). This is a contractual relationship whose remuneration is guided by the (the [ARO](#)). It is my understanding therefore that the taxation of an advocate-client bill of costs is guided by paragraph 10 of the [ARO](#).
12. The [Court of Appeal \(Organization and Administration Act\)](#) in turn, regulates the Registrar of the Court in taxing party and party costs arising from the Court's award of costs. This position is in fact enunciated in Rule 116(1) of the [Court of Appeal Rules](#) in the following terms: -

The Registrar shall be a taxing officer with power to tax the costs arising out of any application or appeal to the Court as between party and party.
13. I therefore have no difficulty finding that the Deputy Registrar had jurisdiction to entertain the taxation matter before her as she rightfully did.
14. The second issue that the Court is called upon to determine is whether there was an error on the taxation of the bill of costs to warrant setting aside of the ruling delivered on July 27, 2022.
15. The principles of setting aside a decision of a taxing officer are well established from judicial authorities including in the cases of *Premch and Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] EA 162, *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92.
16. The general rule is that this court should exercise restraint in interfering with the findings of the taxing officer except where there are reasons to do so. The court will interfere and set aside a decision of the taxing officer if there was an error of principle, if the fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy, if the successful litigant ought to be fairly reimbursed for the costs he has incurred and if in so far as practicable there should be consistency in the award.
17. The respondent first of all denies the existence of an advocate-client relationship between the parties and submits that this is a question that should have been referred to a judge for determination. This court is bound by the decision of the Court of Appeal in [Wilfred Konosi t/a Konosi & Co Advocates v Flamco Limited](#) (2017) eKLR where under similar circumstances the Court of Appeal held that the taxing officer has jurisdiction to determine that question. The taxing officer therefore correctly directed herself when she determined that there was an advocate client relationship in the matter.
18. From the documents on the record, the genesis of this suit was a plaint filed by the firm of Njoroge, Regeru and Co. Advocates. The record further indicates that the advocate's instructions were to represent the client in an application for stay of execution at the Court of Appeal. The application was dismissed before being argued. The applicant was then formally instructed to hand over the matter to Wetangula Adan & Co Advocates. Once again, the taxing officer took this into account in her ruling and I find no reason to interfere with her findings.
19. The applicable framework with respect to taxation of matters in the Court of Appeal is provided for in Rule 116 (3) of the [Court of Appeal Rules, 2022](#) which provision directs as follows:

The remuneration of an advocate by the advocate's clients in respect of application or appeal shall be governed by the rules of, and scales for, proceedings in the High Court.



20. Noting that the Court of Appeal is an appellate court while the High Court has a dual role as a trial and an appellate court, it follows that this provision should be interpreted in respect of proceedings in the High Court that are a mirror of the proceedings in the Court of Appeal. The provisions of remuneration in schedule 6 has provisions for both trial proceedings and appeal matters. As such, the place to find remuneration for appeal matters before the Court of Appeal is remuneration in respect to appeals in the High Court. (See *National Bank of Kenya v Rachuonyo & Rachuonyo Advocates* [2021] eKLR).
21. The advocate faulted the taxing officer on the computation of instruction fees, which ought to be based on the value of the subject matter. In order to ascertain the subject matter value, the Court of Appeal in *Joreth Limited v Kigano & Associates* [2002] eKLR, stated thus:
- “... 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 ascertainable the taxing officer is entitled to use his discretion to assess 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, and direction by the trial judge and all other relevant circumstances.”
22. Likewise, in *Peter Muthoka & Another v Ochieng & 3 others* [2019] eKLR, the Court of Appeal held that: -
- “...It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, ...recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court....It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive...” (emphasis mine).
23. Again, I have perused the record of the lower court and the documents in support of the taxation. The taxing officer disregarded the amended plaint filed in HCCC 543 of 2007 and in my view correctly so. The suit had been dismissed at the High Court, hence the application filed by the advocates at the Court of Appeal. The instructions that the advocates were seized of and for which their work related, was the appeal being Court of Appeal Civil Application 267 and 249 of 2014.
24. The taxing officer could not ascertain the value of the subject matter from the pleadings before the Court of Appeal. This was ostensibly because of the stage at which the fees are being taxed. There was no pleaded amount in the matter as the proceedings before the Court of Appeal were interlocutory in nature, and not for hearing on merit. On this basis the taxing officer applied Schedule 6, Part B of



- paragraph 1 in the ARO. I find that the taxing officer was correct in exercising her discretion in awarding Kshs 175,000/= as instruction fees.
25. The advocate also takes issue with the taxing of getting up fees. The Court in the case of National Bank of Kenya v Rachuonyo & Rachuonyo Advocates [2021] eKLR held that;-
- “The relevant provision for appeals in the High Court, and by deduction appeals before the Court of Appeal, would be paragraph 3 and not paragraph 2 of schedule 6 of the Advocates (Remuneration)(Amendment) Order of 2014”.
26. Paragraph 3 provides as follows: -
- Fees for getting up an appeal;
- In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee.
27. In analyzing this provision, the Court went further to note that eligibility for getting up fees is dependent on certification by the Court entertaining the Appeal, at the conclusion of the hearing, that in view of the extent and difficulty of the work after the lodging of the appeal, the case is a proper one for consideration of getting up fees.
28. The advocate was only instructed to appear in the application for stay of execution, which was subsequently dismissed before being argued. Since the advocates ceased acting before the appeal was heard, there could not have been opportunity for the certification contemplated by the provisions of paragraph 3.
29. Additionally, I concur with judicial pronouncements in Republic v Constituency Development Board Exparte Thomas Mongare Moindi & 3 others Suing as Officials of The Millennium Forum For Unity and Development; Kenya Anti-Corruption Commission (Interested Party) [2020] eKLR that:-
- “The said paragraph must be read together with paragraph 1 of the said Order, as getting up fee that are awarded are dependent on the instruction fees that are taxed, to the extent that it should not be less than one-third of the instruction fees. In this respect, it is evident from paragraph 1 that interlocutory applications are not only absent from the specific categories of cases provides for, but are considered incidental in nature as arising during proceedings on a substantive case. This is also the buttressed by the fact that some interlocutory applications are purely procedural, and are not capable of raising any substantive issue for trial. Getting up fees were therefore not payable on the instruction fees awarded to the Respondent for the subject interlocutory applications for these reasons”.
30. For this reason, it is my finding that the taxing officer was justified in not awarding getting up fees.

Determination and final orders

31. In conclusion, for all the reasons that I have stated, I find no reason whatsoever to interfere with the taxation by the taxing officer. As such, the Chamber Summons dated August 12, 2022 is devoid of



merit and is dismissed. Since the client has not succeeded in the preliminary objection, each party will bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16th DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

