



**Kithi & Co. Advocates v County Government of Kiambu
(Judicial Review Miscellaneous Application E099 of 2021)
[2023] KEHC 18614 (KLR) (Judicial Review) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E099 OF 2021**

**JM CHIGITI, J
JUNE 15, 2023**

BETWEEN

KITHI & CO. ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU RESPONDENT

JUDGMENT

Brief Background

1. On the 29th June 2021, the Applicant herein filed his Bill of Costs dated 23rd June 2021 seeking a total sum of 4,891,247.26 being on account of the advocate-client Bill of Costs for the judicial review proceedings in the nature of the mandamus, certiorari and prohibition in Judicial Review Misc. Application No. 160 of 2016.
2. The Defendant in opposition of the above bill filed an objection dated 22nd October 2021 together with submissions dated 22nd October 2021 in opposition to the same entirely.
3. On the 27th January 2022, the Honourable court delivered a ruling awarding the Applicant taxed costs of Kshs. 1,314,428.08. Having been aggrieved, the applicant herein wrote a letter dated 28th January 2022, under section 11(a) of The *Advocates Act* Cap 16; indicating that an objection will be raised against the said ruling in as far as items no. item no. 1, 2, 6, 12, 23, 29, 32, 37, 41, 46, 51, 76 and the final total of Kshs. 1,314,428.00.
4. Vide the Applicant's Chamber Summons dated 3rd March 2022, the applicant prays for orders that:
 - a. That the decision of the taxing officer made on 27th January 2022 on the applicant's Bill of Costs dated 23rd June 2021 be set aside.



- b. That this court be pleased to assess/tax the costs lawfully payable to the Applicant on the said Bill of Costs.
 - c. That in the alternative, the Bill of Costs dated 23rd June 2021 be taxed afresh by a different taxing officer other than Hon. C. A Muchoki.
 - d. That the Costs of this application be provided for.
5. The Applicant submitted that it is trite law that when taxing the bill of costs, the taxing master is required to take into consideration the nature and importance of the matter, the amount involved the interests of the parties and general conduct of the proceedings and all other relevant circumstances.
 6. The Applicant quoted the principles of taxation as set out in the Court of Appeal's decision in *Premchand Raichand v Quarry Services E.A. Ltd (no. 3)* [1972] E.A. 162, where the Court of Appeal held:
 - a. that costs should not be allowed to rise to a level as to confine access to the courts to the wealthy;
 - 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. so far as is practicable there should be consistency in the awards made.
 7. The Applicant also cited the cases of *Kyalo Mbobu I/a Kyalo & Associates Advocates v Jacob Juma* 2015 eKLR and *Joreth Ltd v Kigano & Associates* [2002 1EA 92] which also gives some guidelines or principles to be applied by a taxing officer in exercise of his discretion to increase the instructions fees.
 8. Vide the Ruling of the taxing officer, the learned taxing officer awarded the applicant the minimum instructions fee of Kshs. 500,000.00 without considering the grounds upon which the Applicant had justified an increase of the minimum instructions fee to Kshs. 2,000,000.00. We submit that the taxing officer failed to consider relevant factors which if she had considered, would have justified an increase of the instruction fees.
 9. According to the Applicant, the taxing officer failed to consider the following relevant factors:
 1. The issue raised by the Applicant herein in the replying affidavit against the judicial review application of the applicant in Judicial Review Misc. Civil Application No. 160 Of 2016 before the Court was novel.
 2. The Applicant was facing imminent prosecution from the Applicant in Judicial Review Misc. Civil Application No. 160 of 2016 and their right to liberty was at stake.
 3. The matter was complex as the documents to be studied were bulky, research involved was tasking.
 4. The time, research and skill expended in the brief.
 5. The amount or value of the subject matter.
 10. The Applicant further submitted that the learned taxing officer erred in principle by holding that the Applicant did not demonstrate of show how many hours were devoted for taking instructions. The applicant herein was representing the county government of Kiambu. Guarding the interests of an entire County. The work involved cannot be watered to appear as if the applicant was representing a person.



11. The Applicant contends that the learned taxing officer erred in principle by not considering the nature and complexity of the matter as discussed in the case of *R v Minister for Agriculture ex parte Njuguna and 2 others* [2006] eKLR. No reason was given for the non-applicability of the said principles to this case.
12. Furthermore, this is a matter that involved the Kiambu County Government, which is a matter of the general public interest. The advocate for the Applicant had a huge burden on behalf of his client to prove the case, which he strongly did.
13. In the case of *Evanson Jidraph Kamau & Another v AG*, MISC. APPL. no.40 of 2000 a judicial review matter, Hon. S. R. Rotich, in considering the complexity, nature of the matter, interest of the parties in the matter and the general conduct of the proceedings awarded instruction fees of Kshs.50 million. He held that the matter was one of public interest since the suit property covered a large part of Likoni area, which was clearly a matter of public interest and had been discussed even in Parliament.
14. In the same spirit, the Applicant holds the reasoning in the above case and therefore prays that the instruction fees be awarded at Kshs.2,000,000.00 instead of Kshs.500,000/= as awarded in the ruling of 27th January 2022. Or better still the taxing officer be inclined to increase the instruction fees.
15. The Applicant further contends that, with regards to the items related to service, we submit that the learned taxing officer erred in principle by indicating that items no. 6, 12,23,29,32,37,41,46 and 51 relate to service of letters and that The Advocates Remuneration order does not provide for service of correspondences hence disregarding the obvious fact that correspondences are meant to be served and not shoved aside.
16. The Applicant submits that computation of the above-noted items has been done in line with schedule 6 sub schedules 9 of the Advocates Remuneration Order 2014. In this regard, the amounts claimed under the above items were justified and the same should be allowed as drawn. Letters are part of the correspondences of the suit, without which, the advocate would not have proof of having communicated with fellow advocates on particular issues. As such, we submit that the said items be taxed as drawn in the bill of costs.
17. With respect to item no. 76, the learned taxing officer erred in principle by indicating that items no.76 having not been supported by any evidence, should not be awarded. Having noted that its normal practice that disbursements have to be incurred even after the respondent in their submissions at paragraph 33 proposed Kshs.10,000/-. The Applicant holds the view that more should be awarded to cover disbursements.

The Respondents case:

18. The Respondent opposes the Bill of Costs dated 23rd June, 2021 (hereinafter referred to as the BOC) for the sum of Kshs. 4,891,247.26/- in its entirety and by extension the Chamber Summons Application dated 3rd March, 2022.
19. According to the Respondent, paragraph 11 Rules (1) and (2) of the Advocates Remuneration Order, 2014 provides that:-
 1. Should any party object to the decision of the Taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects,
 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply



to a Judge by Chamber Summons which shall be served on all the parties concerned, setting out the grounds of this objection.

20. The Respondent believes that before a party can object to the decision of the taxing master, they ought to give notice in writing to the taxing officer of the items of taxation which he objects whereupon the taxing officer is then required to forthwith record and forward to the objector the reasons for his/her decision. Subsequently, the objector has discretion to file his reference within 14 days.
21. The Respondent submits that the Applicant did not seek for the reasons for the decision from the taxing officer and if they did, they have not attached the reasons to the Application and moreover, there is no evidence in that respect. As such, it is clear that the Applicant did not comply with the requirements of Paragraph 11 Rule 1 of the Advocates Remuneration Order, 2014.
22. According to the Respondent the High court can only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle which evidence the Applicant has failed to adduce.
23. The Respondent cited the case of *Republic v Ministry of Agriculture & 2 Others Ex parte Muchiri W Njuguna & 6 Others* [2006] eKLR where Ojwang J. (Retired) stated as follows:

“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, particularly where he is an officer with 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 part or the other... The 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 manifestly excessive as to justify an inference that it was based on an error in principle.”
24. The Respondent further submitted that the Applicant has not satisfied the principles of setting aside the decisions of taxing master which were well established in the case of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya v Shah and Others* [2002] EA 64 and *Joreth Ltd vs Kigano and Associates* [2002] I EA 92. Which include:
 - a. That there was an error of principle;
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the Court to the wealthy,'
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred,'
 - d. That so far as practicable, there should be consistency in the award.
25. According to the Respondent the entire BOC had arithmetic errors and indeed was an unjust enrichment upon the Applicant and consequently, wish that the Ruling as delivered by Hon. C.A Muchoki be upheld.

Analysis and Determination:

26. The following are the issues for determination:



I. Whether the Applicant issued notice in writing to the taxing officer of the items of taxation to which he objects.

27. According to the Respondent, paragraph 11 Rules (1) and (2) of the Advocates Remuneration Order, 2014 and which provides that:-
1. Should any party object to the decision of the Taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by Chamber Summons which shall be served on all the parties concerned, setting out the grounds of this objection.
28. The Applicant has not demonstrated to the court that it gave notice in writing to the taxing officer of the items of taxation which he objects whereupon the taxing officer is then required to forthwith record and forward to the objector the reasons for his/her decision. Subsequently, the objector has discretion to file his reference within 14 days.
29. The impugned ruling was delivered on 27th January 2022. The Applicant wrote a letter on 28th January 2023 to the Deputy Registrar of the High Court objecting to the ruling and requesting for reasons for the decision. This is marked as annexure GK2 to the Affidavit dated 3rd March 2022 of George Kithi. This issue is determined in favour of the Applicant.

II. Whether the Applicant sought for the reasons for the decision from the taxing officer.

30. It is this court's finding that the Applicant sought reasons for the ruling as seen in issue 1 above. This issue is determined in favour of the Applicant.

III. Whether decision made on 27th January 2022 on the applicant's Bill of Costs dated 23rd June 2021 should be set aside.

31. In order to succeed in securing the order to set aside the ruling, the Applicant must demonstrate that the taxing master applied the correct legal principles in determining Bill of Costs.
32. In 1st American Bank of Kenya v Shaha and others The Court of Appeal held as follows:
- “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”.
33. The taxing master awarded the Respondent Kshs. 1,314,428.08 in her ruling delivered on 27th January 2022. Kshs. 500, 000 was for the instructions fees which the Applicant feels is inordinately low and that the same should be increased to Kshs.2, 000,000.
34. I do not think the taxing master acted capriciously when she taxed the amount of instructions fees at Kshs.500, 000. It is this court's finding that she exercised her discretion judiciously in arriving at the impugned figure. She applied the correct principles of law.
35. It is this court's finding that she considered the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings and any direction by the taxing master



and all other circumstances in line with the finding in the case of *Joreth Ltd v Kigano & Associates* [2002] E.A 92.

36. It is my finding that the matter had a public interest dimension in it and in particular the nature of the sport in issue, the complexity of the issues, preparation in taxing the bill at Kshs .500,000 and I find no justification to interfere with the finding. The taxed sum of Kshs. 1,314,428.08 is commensurate to the nature of the work done by counsel.
37. It is my finding that the complex elements in the proceedings which guided the exercise of the taxing officer's discretion was sound.
38. The sum of Kshs.500,000 sits well with the findings of the Court of Appeal in *Premchand Raichand Ltd. and Another v Quarry Services of East African and Others* [1972] EA 162
- a. That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
 - b. that a successful litigant ought to be fairly reimbursed for the cost 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. so far as practicable there should be consistency in the award made and
 - e. The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.
39. The sum of Kshs. 500,000 in my opinion offers a competitive and fair reimbursement for costs that counsel has incurred. The amount of Kshs. 500,000 is an amount that is the general level of remuneration of advocates and that which attracts recruits to the profession thereby not shutting down access to justice therefore promoting Article 48 of *the Constitution*.
40. I am in agreement with the finding in the case of *Republic v Nyeri County Government Ex Parte Central Kenya Coffee Mill Limited* [2017] eKLR where the applicant had filed a reference seeking Kshs. 3,000,000/as instruction fees and in granting instruction fee of Kshs. 150,000/= the court stated.

“I have read the submissions by the respective parties concerning that award. Whilst I agree with counsel for the applicant / respondent that this being a judicial review matter instruction fees did not turn on the value of the subject matter and that the matter was not so complex to warrant the issuance of the instruction fees charged, based on awards in similar matters and taking into account the principal that in so far as is possible there should be consistency in taxation of costs for judicial review matters, I am of the considered view that the award should have been based on the higher scale as opposed to the lower one.

In determining instruction fees, it must be related to the value of the work done by an Advocate. Advocates should be fairly, appropriately and justly rewarded for their fees bearing in mind the skill they exercised. The Applicant has not demonstrated or shown me or satisfied me as to the number of hours they devoted for taking instructions from the time they were employed.”

41. The taxing master made it clear that she considered the time taken, scope of work done and the nature of the dispute.



42. The upshot of the foregoing is that the Applicant has neither proven nor tendered evidence that would persuade this court to set aside the ruling of 27th January 2022 on the applicant's Bill of Costs dated 23rd June 2021.

IV. Whether this court should assess/tax the costs lawfully payable to the Applicant on the said Bill of Costs and whether in the alternative, the Bill of Costs dated 23rd June 2021 should be taxed afresh by a different taxing officer other than Hon. C. A Muchoki.

43. Upon finding that there was no need to set aside the ruling of 27th January 2022, this court has no business taxing the Bill of Costs dated 23rd June 2021 issues 4 and 5 cannot avail.

V. Whether the Applicant should be awarded Costs of this application.

44. In exercise of discretion, it is this court's finding that the Applicant is not entitled to costs.

Disposition:

45. The Applicant has not made out a case that would warrant my interference with the Honourable Deputy Registrars ruling of 27th January 2022 and I so hold.

Order:

46. The Chamber Summons application dated 3rd March 2022 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023

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J. CHIGITI (SC)

JUDGE

