



**Mwangi Keng'ara & Co. Advocates v Mungai (Miscellaneous Case E355 of 2021)
[2023] KEHC 20394 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CASE E355 OF 2021**

A MABEYA, J

JUNE 16, 2023

**IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA AND
THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 1962) REV. 2017**

BETWEEN

MWANGI KENG'ARA & CO. ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

RULING

1. Before Court is an application by the Advocate dated December 2, 2021. It was brought under Paragraph 11(2) and (4) of the Advocates Remuneration Order.
2. The application sought for enlargement of time to file a reference out of time and that the ruling of the taxing officer dated October 15, 2021 on items 1 and 19 (herein after 'the items') in the bill of costs dated May 13, 2021 be set aside and that the Court award appropriate fees on a higher scale on those items.
3. The grounds for the application were set out on the face of it and in the supporting affidavit of Mercy Nduta Mwangi sworn on December 3, 2021.
4. It was the Advocate's contention that despite objecting to the taxation on October 27, 2021 and applying for reasons, none had been supplied. She first saw the ruling upon being served with a summons in chambers dated November 10, 2021. That the time for filing the reference be enlarged and no prejudice will be suffered.



5. That the subject matter was an appeal from a primary suit whose value was Kshs 2,300,278/50. That the taxing officer applied the wrongscale in reducing the instruction scale by 35% yet no opposition is expected against a Memorandum of Appeal.
6. The respondent opposed the application vide her replying affidavit sworn on February 12, 2023. She contended that the advocates bill of costs was taxed for Kshs 183, 247/= on October 15, 2021 and a sum of Kshs. 84,915/= was taxed off. That the reasons for the decision were contained in the detailed ruling of the taxing officer which was emailed to the parties on the delivery date.
7. She further contended that the taxing officer properly addressed herself in reducing the instruction fees to 65% under Schedule 6 Paragraph 1(a) of the Advocates Remuneration Order as no defence was filed against the Memorandum of Appeal. That there was no error in principle to warrant interference by this Court.
8. She contended that the reference was filed out of time, almost 2 years since the ruling. That no action was taken for that period to pursue the reasons for the decision.
9. The application was canvassed by way of written submissions. The Advocate's submissions were dated March 13, 2023 whereas those of the respondent were dated 24/3/2023. Those submissions have been considered along side the pleadings and evidence before Court.
10. The application was brought under Rule 11 (2) of the Advocates Remuneration Order which provides that: -

“ 11. Objection to decision on taxation and appeal to Court of Appeal

- (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 his objection.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”
11. The objection was filed on October 27, 2021 which was 12 days after the ruling was delivered. The applicant applied for the reasons and none were given. She only saw the ruling in November, 2021 and immediately lodged the present application. The respondent alleged that the ruling was emailed to the parties on the same day of the ruling. There was no such evidence on record. Since the taxing officer did not respond to the applicants request for reasons; I am inclined to determine in her favour. The



time is enlarged accordingly, if need be, having in mind that the taxing officer has never responded to the applicant's request for reasons.

12. On circumstances where a Judge can interfere with the decision of a taxing master, the court held in *First American Bank of Kenya Ltd v Gulab P Shah & 2 others* [2002] eKLR, that: -

“I have considered the above submissions. 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. (See *Steel & Petroleum (ea) Ltd v Uganda Sugar Factory* (Supra). Of course. It would be an error of principle to take into account irrelevant 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 re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment. (see *Nanyuki Esso Service v Touring Cars Ltd*; *Steel & Petroleum (ea) Ltd v Uganda Sugar Factory*; *Thomas James Arthur v Nyeri Electricity Undertakers And Joreth v Kigano & Associates*).”

13. In the same case, the court held that a taxing officer had discretion to increase or reduce instructions fees. The court observed: -

“The other general principle is that it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and that the amount of the increase or reduction is discretionary. (See *Thomas James Arthur v Nyeri Electricity Undertakers*). In that respect, I must reject the submission made on behalf of the third defendant that the taxing officer has no discretion to reduce the basic instruction fees. On the contrary, I accept the submission made on behalf of the plaintiff that such discretion exists and that the only fees which cannot be reduced are those in respect of which it is provided that the amount thereof shall not be less than what is prescribed. An example is schedule VI (1) (g) (i): the instruction fees in matrimonial causes.”

14. In the present case, the applicant's main contention was that the taxing master failed to apply the correct Advocates Remuneration Order. That she applied the 2014 instead of 2017. That she also erred in applying paragraph 1(a) instead of 1(b) of the Advocates Remuneration Order.

15. I have seen the ruling of the taxing master. She applied the Advocates Remuneration Order, 2014. The Memorandum of Appeal was lodged 2019. According to Legal Notice No. 268 of October 11, 2017, the Advocates Remuneration Order, 2017 came into force on that date and the one of 2014 ceased then. Accordingly, the taxing officer erred in applying the 2014 instead of 2017.

16. Further, the taxing officer determined the instructions fees under paragraph 1(a) which applies to where no appearance or defence is lodged. This was an appeal in the High Court where no appearance or any sort of defence is expected. In this regard, the proper paragraph should have been paragraph 1(b) of the 2017 Advocates Remuneration Order.



17. From the foregoing, the reference is meritorious. I allow the same. The bill of costs is remitted back for taxation of the 3 items on the basis of the foregoing directions.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

A. MABEYA, FCIArb

JUDGE

