



**Mwangi Keng'ara & Co Advocates v Mungai (Miscellaneous Civil Application  
356 of 2021) [2023] KEHC 20400 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20400 (KLR)

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

**MISCELLANEOUS CIVIL APPLICATION 356 OF 2021**

**A MABEYA, J**

**JUNE 16, 2023**

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF  
KENYA AND THE ADVOCATES (REMUNERATION) (AMENDMENT)**

**ORDER, 1962 (REV, 2017)**

**AND**

**IN THE MATTER OF TAXATION**

**BETWEEN**

**MWANGI KENG'ARA & CO ADVOCATES ..... ADVOCATE**

**AND**

**ZIPPORAH MUNGAI ..... CLIENT**

**RULING**

1. This ruling is on the advocate's summons in chambers dated November 26, 2021. It was brought *inter-alia*, under paragraph 11(2) of the *Advocates Remuneration Order*.
2. The advocate sought to have the ruling of the taxing officer dated October 15, 2021 on item numbers 1, 4, 5, 10, 11, 17, 18 and 19 set aside and to have this court re-tax them as drawn in the advocate/client bill of costs dated May 13, 2021.
3. In the alternative, the advocate sought an order to have the decision of the taxing officer on those items set aside and the advocate/client bill of costs dated May 13, 2021 be remitted back for re-taxation by any other taxing officer with appropriate directions.
4. The grounds for the application include that the taxing officer erred in principle and in law in applying the lower scale in determining instruction fees whereas the suit was contested and thereby arrived at



- a wholly unjust decision. That the taxing officer erred in principle and in law by excluding the costs claimed in the primary suit in determining the subject matter thereof and thereby failed to correctly ascertain the value of the subject matter of the taxation or arrive at the appropriate instruction fees.
5. That the taxing officer erred in principle and law in wrongfully taxing off item numbers 4, 5, 10 and 11 on the basis that they are not provided for under schedule 7 contrary to express provisions of paragraph 5, 6, and 11 of schedule 7 in the *Advocates Remuneration (Amendment) Order*, 1962 (2017).
  6. That the ruling dated October 15, 2021 on item numbers 1, 4, 5, 10, 11, 17, 18 and 19 is unlawful and unjust in so far as it is based on a misconception of the law and it deprives the advocate of remuneration for services that were not disputed by the client and which were actually rendered.
  7. In opposition to the application, the respondent lodged a replying affidavit sworn by herself on February 17, 2023. She averred that the applicant's bill of costs was taxed for Kshs 175,800.18 on October 15, 2021 and a sum of Kshs 229,962.50 was taxed off; that she paid the aforesaid assessed costs via cheque number 001595 for Kshs 175,800/- dated November 16, 2021.
  8. That in assessing the costs payable to the advocate, the taxing officer properly addressed herself to the value of the subject matter and the applicable scale under the *Advocates Remuneration Order* and that there is no error of principle to warrant interference by this court.
  9. The respondent averred that under the *Advocates Remuneration Order* schedule 7 1 (b) where a matter is determined summarily without going to full trial, the taxing master has the discretion and power to reduce the instruction fees to 75%.
  10. Further, that the reference herein is fatally defective as it was filed out of time without the leave of the court and ought to have been filed on or before November 9, 2021.
  11. In addition to her supporting affidavit of November 26, 2021, the advocate filed a supplementary affidavit sworn on March 13, 2023 by Mercy Nduta Mwangi, an advocate practising in the firm. She averred that the taxing officer did not consider the advocate's submissions in her ruling. That the taxing officer carried out the wrong calculation of interest leading to a wrong value of the subject matter, which resulted in a low assessment of instruction fees.
  12. Further, that the taxing officer applied the lower scale in the taxation in total disregard of the denial of liability which had been filed by the defendants.
  13. It was emphasised that the ruling dated October 15, 2021 contained an error of principle in failing to ascertain the correct value of the subject matter and the correct applicable scale for assessment of instruction fees.
  14. I have considered the rival contestations in this matter. The advocate represented the client in Milimani Commercial Chief Magistrates Court civil suit No 4675 of 2019 wherein she filed a plaint and summons to enter appearance. The suit was determined summarily when judgment in default of a defence was entered on February 13, 2020.
  15. Subsequently, the advocate filed an advocate-client bill of costs dated May 13, 2021 which was taxed for Kshs 175,800.18 on October 15, 2021.
  16. In the present application, the advocate argued that the taxing officer applied a lower scale in determining instruction fees despite the fact that the suit was contested. In her ruling, the deputy registrar found that Milimani Commercial Chief Magistrates Court civil suit No 4675 of 2019 had been determined summarily without going to full trial therefore, the value of the subject matter was



reduced by 75% pursuant to schedule 7 paragraph 1(b) of the Advocates Remuneration Order to Kshs 106,889.65.

17. Schedule 7 paragraph 1(b) of the *Advocates Remuneration Order* states that where a suit is determined in a summary manner without going to full trial, the instruction fee shall be 75% of the fee chargeable.
18. The record indicates that Milimani Commercial Chief Magistrates Court civil suit No 4675 of 2019 was determined in a summary manner. The defendant did contest the suit by applying to stay the same. In such a situation, it cannot be said that the suit was not contested. The suit was contested but determined summarily. The fact that the lower court had to rule on the matter and held that it had no jurisdiction cannot be said that the suit was uncontested. It was contested that is why the court had to determine the issue of jurisdiction.
19. The correct position is that the suit was contested and the proper scale applicable is not the lower scale. However, since the suit was determined summarily, schedule 7 paragraph 1(b) of the *Advocates Remuneration Order* was applicable. That being the case, all that the taxing officer was to do was to award 75% of the amount under that paragraph. The scale applicable should have been the higher scale.
20. Instead, the taxing officer indicate that the amount be reduced by 75%. What the paragraph means is that the chargeable amount should be 75% of the actual amount. To this extent, that was an error in principle when she reduced the amount by 75% and applied the lower scale.
21. The applicant further contended that the deputy registrar arrived at the wrong value of the subject matter of the suit. The deputy registrar in her ruling determined the value of the subject matter from the judgment in default. I cannot fault her calculation of the interest post the suit. The costs cannot be taken into account in calculating the subject matter.
22. In the case of *Joreth Limited v Kiganjo & Association* 2002 eKLR it was held:

“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 and all other relevant circumstances.”
23. In this case, the subject matter of the suit was ascertainable from the judgment in default which determined as follows: -

“Principal debt ..... Kshs 3,000,000.00  
Interest from September 15, 2018 to September 16, 2019 -Kshs 758,625.00  
Interest from May 16, 2019 to February 13, 2020 at 42% ... Kshs 521,260.27  
Total - Kshs 4,279,885.27”
24. The upshot is that the instruction fees was properly arrived at by the taxing officer and there was no error thereon.
25. On the other items, I see no error in the decision arrived at by the taxing officer.



26. Accordingly, the reference is successful to the extent of the item on the instruction fees since the bill of costs was taxed under the 2014 *Advocates Remuneration Order* instead of the 2017, the same is remitted for taxation on the higher scale under the 2017 ARO by a different taxing officer

27 It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

