



**Rachier & Amollo Advocates v Noble Gases International Limited
 (Miscellaneous Application E513 & E507 of 2022 (Consolidated))
 [2023] KEHC 19093 (KLR) (Commercial and Tax) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19093 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
 COMMERCIAL AND TAX
 MISCELLANEOUS APPLICATION E513 & E507 OF 2022 (CONSOLIDATED)
 JWW MONG'ARE, J
 JUNE 19, 2023
 IN THE MATTER OF; ITAS NO. E140 & E143 OF 2021**

**BETWEEN
 RACHIER & AMOLLO ADVOCATES APPLICANT
 AND
 NOBLE GASES INTERNATIONAL LIMITED RESPONDENT
 AS CONSOLIDATED WITH
 MISCELLANEOUS APPLICATION E507 OF 2022**

**BETWEEN
 RACHIER & AMOLLO ADVOCATES APPLICANT
 AND
 NOBLE GASES INTERNATIONAL LIMITED RESPONDENT**

RULING

1. This is a combined ruling of the Misc Application No E513 of 2022 and E507 of 2022 both emanating from Bill of Costs arising from representation in ITA nos E140 and E143 of 2023 between the Client, Noble Gases International Limited and the Commissioner of Domestic Taxes. The issues in the two references are similar and will be decided together in this ruling.



2. The Advocate applicant has filed a reference before this court dated June 30, 2023 challenging the decision of the taxing master's ruling delivered on June 3, 2023 on item 1 & 2 of the Bill of costs dated February 4, 2022 under sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 laws of Kenya and Paragraph 11 of the Advocates Remuneration Order, 2009.
3. The said application is supported by the grounds set on its face and the supporting affidavit of Kevin Wakwaya, an Advocate in the Applicant's law firm. The Application is opposed and the client Respondent has filed a replying affidavit sworn by Jaspal Singh Nyotta, a director of the Respondents.
4. It is not disputed that the Advocate was retained to defend the Client in a Tax Appeals matter where the Commissioner of Domestic Taxes had demanded from the client taxes amounting to Kshs 198,147,222/- in ITA Case No 140 of 2021. It is also not disputed that the relationship was terminated by the client before the matter was concluded. The Advocate therefore contends that the value of the subject matter for which they were instructed to defend was discernible as being Kshs 198,147,222/- and that items 1 and 2 of their Bill of costs should have been taxed against the said value of the subject matter.
5. The Client on the other argues that subsequently and upon instructing new counsel, the matter was settled and a consent judgment entered at Kshs 49,655,550/-, which is the value that the taxing master considered during taxations for items 1 & 2 in the Bill of costs. The respondent urges the court to find that it was the correct principle and that there was no error of principle by the taxing master.

Analysis and Determination: -

6. I have considered the pleadings by the parties and their written submissions and the oral arguments made subsequent thereto and I have identified one issue for determination, to wit; "What was the proper value of the subject matter applicable at taxation of the Advocate-Client Bill of costs?". Both parties agree that indeed the value of the subject matter is discernible and that the same should be used as the determinant for instructions fees as held by the Court of Appeal in *Peter Muthoka & Another v Ochieng & 3 others*, Nairobi Civil Appeal No 328 of 2017(2019)eKLR where the court stated;-

"It seems quite plain that the basis for determining subject matter value for purposes of instructions fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is pleadings that form the basis for determining subject value. Once Judgment has been entered, and for what seems to us to be obvious reason, 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."

7. Further, the Court of Appeal held in *Joreth Limited v Kigano & Associates* (2002)eKLR that "Instructions fee is an independent and static item, charged once only and is not affected by the stage the suit has reached." It is trite that instructions fees accrue to an Advocate at the time of instructions and that the same are payable to the Advocate irrespective of the outcome of the case. In the matter before me, I note that the at the point of instructions, the client did ask the Advocates to defend a tax appeal whose subject value was Kshs 198,147,222/-. Subsequently, when the Advocate-Client relationship ended, the Advocate filed a Bill of Costs. The taxing master, however, in determining item 1 of the Bill of costs, applied the consent judgment entered subsequently to the termination of instructions as the subject value. To my mind, this was an error of principle since at instructions and at termination of retainer of the Advocate by the client, the value discernible from the pleadings was Kshs 198,147,222/-. It is therefore my finding that the taxing master erred in principle in failing to base



its taxation on the value discernible at instructions, at termination of retainer and at filing of the Bill of costs which was Kshs 198,147,222/-.

8. Secondly, Part B of schedule 6 of the [Advocates Remuneration Order](#) provides as follows; B—advocate And Client Costs

“ As between Advocate and client the minimum fee shall be—

- (a) the fees prescribed in A above, increased by 50%; or
- (b) b) the fees ordered by the court, increased by 50%; or
- (c) The fees agreed by the parties under Paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.”.

9. The taxing master upon taxing the Advocates-Client Bill of costs is by law required to increase the amount under item 1 by 50%. It has been demonstrated by the parties that the same was not done in this matter and no explanation was availed or reasons provided why the same was not done. This was an error of principle on the part of the taxing master as was held by the court of appeal in the case of [Otieno, Ragot & Company Advocates vs Kenya Airports Authority](#) (2021)eKLR where it stated:-

“With the instructions fees, that being Part A having been discerned what the taxing officer was then required to do so as to determine the Advocate and client costs was to apply the formula set out in Schedule VI Part B...What comes to the fore from these authorities, and with which I am in agreement is that, once the instruction fee in the party and party costs ascertained, they become the basis of the computation of the instruction fees in the Advocates-Client bill. The instruction fees in the party and party bill is then increased by one-half to arrive at the instruction fees for the Advocate and client bill. No further exercise of discretion is required at this point....By declining to comply with Schedule VI Part B of the [Advocates Remuneration Order](#) and increase the already determined fees by one-half to arrive at the Advocate and Client instruction fees for the reason that party and party were independent of Advocate-Client costs, and instead exercise her discretion citing public interest to ascertain the instructions fees, which was not a consideration or what the [Advocates Remuneration Order](#) called upon her to do in the prevailing circumstances, I find that the taxing officer misdirected herself by failing to take into account matters that should have been taken into account, and in so doing she arrived at an erroneous decision.”

10. From the foregoing, I am persuaded that the taxing master erred in principle in failing to apply the correct value of the subject matter which was at the time of filing the Bill of costs discernible from the pleadings at Kshs 198,147,222/- . The second error of principle by the taxing master was failure to apply Part B of Schedule VI of the [Advocates Remuneration Order](#) to the determined instruction fee and increase the same by one-half as required by law.
11. Flowing from the above conclusion, I find and hold that the application before me has merit and I shall allow it. The taxing master is directed to carry out a fresh taxation of the Advocate-Client Bill of costs of items 1 & 2 taking into consideration the findings of this court. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE 2023

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J. W. W. MONGARE



JUDGE

In the Presence of:-

1. Mr. Wakwaya for the Advocate/Client.
2. Mr. Kariithi for Client/Respondent.
3. Sylvia- Court Assistant.

