



REPUBLIC OF KENYA



KENYA LAW

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Muthaura Mugambi Ayugi Advocates v Musimba Investments Limited (Miscellaneous Application E830 of 2020) [2023] KEHC 20668 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E830 OF 2020**

EC MWITA, J

JULY 21, 2023

BETWEEN

MUTHAURA MUGAMBI AYUGI ADVOCATES ADVOCATE

AND

MUSIMBA INVESTMENTS LIMITED CLIENT

RULING

1. This ruling disposes two application: A reference dated 24th March 2022 seeking to set aside the taxing officer's decision delivered on 5th May 2022, and a motion dated 27th May 2022, seeking judgment in terms of the taxed costs, the first and second application respectively.
2. The common denominator in the two applications is that they arise from the decision of the taxing officer made on 5th May 2022. By that decision, the taxing officer taxed the advocate-client bill of costs dated 24th June 2020 and allowed it against the client in the sum of Kshs. 960,373.64.
3. The client was aggrieved and filed a reference to set aside that decision. On the other hand, the advocate filed the motion seeking judgment in terms of the certificate of costs issued following the taxation of that bill of costs.

First application

4. As stated earlier, this is a reference against the decision of the taxing officer allowing the advocate-client bill of costs at Kshs. 960,373.64. The client who is the applicant, wants that decision set aside and the bill of costs remitted back to the taxing officer for taxation afresh.
5. The reference is premised on the supporting affidavit and written submissions. The client submitted that the taxing officer erred in principle in placing heavy reliance on the Evidence Act in relation to the



burden of proof instead of the burden of proof provided for in the *Advocates Act*, and more particularly, rule 13 of the *Advocates (Account) Rules* which shifts the burden to the advocate.

6. The client argued that there was no evidence to controvert its case that legal fees had been paid to the advocate's former partner. The taxing officer is also blamed for misinterpreting the decision in *Leisure Lodges Limited v Japheth S Asige S O Anyanzwa t/a Asige Keverenge & Anyanzwa Co. Advocates* [2017] eKLR.
7. The taxing officer is further blamed for allowing instruction fee at 500,000, thus erroneously exercising her discretion and increased the fee in a manner that made it manifestly excessive to warrant interference by this court.
8. According to the client, the taxing officer erred by assessing instruction fee based on the value of the subject matter that gave rise to the interlocutory appeal and not the appeal itself. The advocate also failed to demonstrate special circumstances to justify increase of the scale of fees set under her *Advocates Remuneration Order* in the subject matter (Appeal No. 138 of 2013- *Musimba investments Ltd v Nokia Corporation*).
9. It is the client's case that instruction fee should be reviewed downwards to Kshs. 6,300 and the increase by ½ adjusted accordingly. Similarly, VAT should be adjusted once instruction fee is reduced to Kshs. 6,300.
10. The client again blamed the taxing officer for applying wrong principles in assessing getting up fee, thereby allowing an excessively high amount.
11. The client relied on several decisions in support of the reference. These included; *Premchand Reichand v Quarry Services of East Africa Ltd & others* [1972] EA 162 that the court will not interfere with the taxing officer's decision unless it was based on an error of principle; *First American Bank of Kenya Limited v Shah & others* [2002] 1 EA 62 and *Republic v Commissioner of Domestic Taxes Ex arte Ukwala Supermarket Limited & 2 others* [2018] eKLR.
12. The client further relied on *Mbogo & another v Shah* [1968] EA 93 on the argument that an appellate court will not interfere with the trial court's exercise of discretion unless it is satisfied that the trial court misdirected itself on some matter and arrived at an erroneous decision. The client urged that the reference be allowed with costs.
13. The advocate opposed the reference through a replying affidavit and written submissions. The advocate argued that the client's contention that the taxing officer put a lot of reliance on the *Evidence Act* instead of rule 13 of the *Advocates (Account) Certificate Rules* has no merit. The Advocate maintained that the client did not adduce evidence to show that fees had been paid either to the firm or a former partner.
14. Regarding the decision in *Leisure Lodges Limited v Japheth S Asige S O Anyanzwa t/a Asige Keverenge & Anyanzwa Co. Advocates* [2017] eKLR, the advocate asserted that the decision is not relevant or applicable in these proceedings.
15. The advocate asserted that an advocate is entitled to instruction fee on being instructed to sue or defend and relied on *Mayers and another v Hamilton and others* [1975] EA 13 in that regard.
16. According to the advocate, there was no agreement for fees which should have been dealt with in accordance with section 45 of the *Advocates Act*. That was why advocate-client bill of costs was filed for taxation. It is the advocate's case, therefore, that the issue is not about retainer but that the client did not pay fees for professional services rendered.



17. The advocate relied on *Joreth Limited v Kigano & Associates Advocates* [2002] eKLR to argue that instruction fee is to be determined on the basis of the value of the subject matter. For that reason, the taxing officer determined instruction fee by properly and judiciously exercising her discretion, VAT and the other items in the bill of costs.
18. The advocate urged the court to uphold the taxing officer's decision and dismiss the reference with costs.

Second application

19. The second application is the motion dated 27th May 2022 by the advocate, seeking judgment in terms of the certificate of costs dated 23rd May 2022. In that certificate, the taxing officer taxed the advocate-client bill of costs dated 24th June 2020 and allowed it at Kshs. 960,373.64. The motion is supported by an affidavit and written submissions.
20. The client opposed the application through a replying affidavit and written submissions.
21. I have considered the twin applications, responses and submissions. For tidiness, I will deal with the first application because its determination will give the direction the second application will take.

Whether to set aside

22. The principles applicable in the taxation of bill of costs are settled. A taxing officer exercises judicial discretion when taxing a bill of costs. This court will, therefore, not interfere with that exercise of discretion unless it is demonstrated that the taxing officer wrongly exercised the discretion and took into account a wrong principle so as to call for interfering by this court. (*Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* (HCCMISC. Cause No. 843 of 2013).
23. In *Vipul Premchand Haria v Kilonzo & Co Advocates* [2020] eKLR, the court held that a taxing officer is entitled to use his discretion to assess instruction fee as he considers just, taking into account, among other factors, the nature and importance of the cause or matter.
24. In *Rogan-Kemper v Lord Grosvenor (No.3)* [1977] KLR 303]; [1977] eKLR, Law, J A stated that:

A Judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate.
25. Similarly, in *Bank of Uganda v Banco Arabe Espaniol*, (Civil Application No. 29 of 2019), Mulenga JSC, writing for the Supreme Court of Uganda, stated that even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum, and that upholding the amount allowed would cause injustice to one of the parties.
26. It is on the basis of these principles that this court will approach the matter at hand. However, before doing so, there is the argument that the taxing officer placed a lot of emphasis on the *Evidence Act* in so far as the burden of proof is concerned instead of rule 13 of the *Advocates(Account) Certificate Rules* while taxing the bill of costs.
27. I have perused the impugned decision and seen the reason why the taxing officer addressed herself to the burden of proof under the *Evidence Act*. The client appeared to have argue before the taxing officer that there was an agreement between the advocate and client fixing legal fees at not more than Kshs. 1,500,000 which had been paid and, therefore, no fee was outstanding.



28. The taxing officer stated that the law is settled that he who alleges must prove and made reference to section 107 of the Evidence Act. She pointed out that it is upon discharging the burden that the burden shifts to the other party. In that regard, the taxing officer found that the client had not adduced evidence that payment of fees had been made, no receipts, communication or correspondence were produced that would lead to an inference that indeed fees had been paid.
29. In that regard, the client did not point out to this court the evidence it was relying on to disprove the trial court's finding that payment had not been made and proved. This court does not find any merit in the argument that the taxing officer erred in stating that the client had the burden to prove as required by section 107 of the Evidence Act. I find no merit in this complaint.

Instruction fee

30. The client argued that the taxing officer erred in principle in allowing instruction fee at Kshs. 500,000 instead of Kshs. 6,300. The advocate maintained that the trial court was right in allowing instruction fee at that amount.
31. I have perused the taxing officer's decision on the issue. The taxing officer applied the 2006 Advocates Remuneration Order given that instructions were issued in 2013. There is no argument that the Remuneration Order applicable was not that of 2006.
32. Regarding instruction fee, the taxing officer reminded herself on the principles applicable in determining instruction fee by referring to the principles set out in the decision of Joreth Limited v Kigano & Associates Advocates (*supra*). The taxing officer then stated that the value of the subject matter could not be determined from the pleadings and, therefore, instruction fee was to be taxed pursuant to Schedule VI Paragraph 1(m) of the Order. The paragraph allows the taxing officer to award instruction fee of the sum as may be reasonable but not less than Kshs. 6,300 for presenting or opposing an appeal in any case where fee is not provided for.
33. On whether the advocate was entitled to additional instruction fee, the taxing officer referred to the decision in Republic v Minister of Agriculture & 2 others Ex parte Samuel Muchiri W'njuguna & 6 others [2006] eKLR as the guide on the issue. The taxing officer then considered the nature of the matter and its importance to the parties and exercising her discretion, allowed instruction fee at Kshs. 500,000.
34. The client's argument case is that the taxing officer erred in principle in applying the value of the subject matter that gave rise to the interlocutory appeal for purposes of determining instruction fee. According to the client, the taxing officer should have allowed instruction fee at Kshs. 6,300 and not 500,000 which was excessive. The taxing officer also failed to consider the fact that fees had been paid to a former partner.
35. The advocates held the position that the taxing officer did not err in principle and was right in allowing instruction fee at Kshs. 500,000. According to the advocate, there was no proof that fees had been paid to the firm or former partner.
36. The law is settled that for purposes of determining instruction fee, the taxing officer should identify the value of the subject matter from the pleadings, judgment or settlement. Where this is not possible, the taxing officer will 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 the matter, interest of the parties, general conduct of the proceedings, any direction of the trial judge and all other relevant circumstances. Joreth Ltd v Kigano & Associates Advocates (*supra*).



37. I have read the decision of the taxing officer on instruction fee. The taxing officer appreciated that the value of the subject matter could not be ascertained from the pleadings. She applied Schedule VI paragraph 1 (m) which allows fees of not less than 6,300 but gives discretion to determine fees that may be reasonable. Taking the Schedule VI and paragraph 1(m) into account, the taxing officer then considered the nature, complexity and importance of the matter to the parties and applying her discretion, allowed instruction fee of Kshs. 500,000.
38. There is no doubt that the taxing officer exercised her discretion in allowing the impugned instruction fee. In that regard, the law is that a taxing officer is entitled to use his discretion to assess instruction fee as he considers just, taking into account, among other factors, the nature and importance and complexity of the cause or matter (*Vipul Premchand Haria v Kilonzo & Co Advocates-supra*).
39. A Judge will also not substitute what he considers to be the proper figure for that allowed by the taxing officer, unless in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate. (*Rogan-Kemper v Lord Grosvenor –supra*).
40. Even where it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum, and that upholding the amount allowed would cause injustice to one of the parties. (*Bank of Uganda v Banco Arabe Espaniol-supra*).
41. The bill of costs arose from professional work rendered in an appeal. The client has not shown that the taxing officer applied a wrong principle; that the taxing officer went outside the limits to make the award excessive or that the error, if any, substantially affected the decision on quantum, and upholding that amount would cause injustice to the client.
42. In the circumstances, I do not agree with the client that the taxing officer applied a wrong principle in determining instruction fee or that the award of instruction fee was erroneous to warrant interference by this court.
43. Regarding item Nos. 2,5,6, 30, 37, 39, and 40, I note that according to the decision of the taxing officer, those items were taxed as drawn by consent. No issue would arise on those items.
44. All other items were allowed because they were drawn to scale. The client has not shown that those items were not drawn to scale or why the taxing officer was wrong. This court finds no reason to interfere with the trial court's decision on those items.

Second application

45. The second application seeks judgment in terms of the certificate of costs dated 23rd May 2022. In that certificate, the taxing officer allowed the Advocate-client bill of costs at Kshs. 960,373.64. The reference having failed, there would be no reason not to allow this application.

Conclusion

46. Having considered the reference and arguments for and against, the conclusion I come to is that the reference has no merit. The taxing officer exercised her discretion in determining instruction fee. There was no error of principle that would make this court interfere with that exercised of discretion. The rest of the items were either taxed by consent or were allowed because they were drawn to scale.
47. The application for judgment must be allowed the reference having failed.



Disposal

- i. The reference dated 24th May 2022 is dismissed with costs.
- ii. The application dated 27th May 2022 is allowed with costs. Judgment is entered for the advocate for Kshs. 960,373.64 in terms of the certificate of Costs dated 23rd May 2022, The judgment will attract interest at 14% from 10th July 2022 until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2023

E C MWITA

JUDGE

