



**Nchogu Omwanza & Nyasimi Advocates v Ogle Construction  
Company Limited (Miscellaneous Civil Application E094 of 2021)  
[2023] KEHC 21922 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21922 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E094 OF 2021  
DO CHEPKWONY, J  
JULY 21, 2023**

**BETWEEN**

**NCHOGU OMWANZA & NYASIMI ADVOCATES ..... APPLICANT**

**AND**

**OGLE CONSTRUCTION COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. This Reference is in respect of the Chamber Summons Application dated April 20, 2022 which seeks to set aside the Ruling of the Taxing Officer in regard to Items 1 and 2 of the Bill of Costs dated February 9, 2021 and to have the figures in those items readjusted and/or reassessed.
2. The Application is based on the grounds on its face and the Supporting Affidavit of Alex Masika, an Advocate of the High Court of Kenya 'the Advocate'. It has been opposed through the Replying Affidavit of Ahmedsiad Mohamed Abdi 'the client' sworn on June 6, 2022.
3. The Advocates hold that they were instructed by the client to represent them at the Public Procurement Administrative Review Board in Application No 36 of 2017 filed on April 7, 2017 between Ogle Construction Company Limited and Kenya Airports Authority. According to the Advocates, the Request for Review was filed in respect to a tender for the proposed rehabilitation of the Wajir International Airport ( Runway, taxiways, apron and access road) in Wajir at a contract value of Kshs 819,264,953.10 and the filing fees for the Request for Review was Kshs 205,000/= which sum was paid by the client.
4. It is the Advocates averment that after successful negotiations, the application was withdrawn. The Advocates contend that they rightly filed and issued their professional fee note in a letter dated January



- 27, 2021 of Kshs 7,603,111.00 in accordance to Schedule 11 of the [Advocates Remuneration Order](#) for the work done and the complexity of the matter which the Client did not respond to.
5. The Advocates hold that they then filed the Bill of Costs dated February 9, 2021 whose ruling was delivered virtually on May 11, 2021 but was dated June 10, 2021 and is therefore defective. The Advocate goes on to state that the Deputy Registrar did not consider the subject value of the contract under Item No 1 hence taxed the amount very low and the complexity of the matter which caused Item No 2 to be disallowed.
  6. The Advocate contends that the amount under Item No 1 was excessively low which amounts to an error in principle since the subject matter was in excess of Kshs 819,264,953.10. The Advocate argues that the taxed amount of Kshs 200,000/= was very low especially considering that the filing fees for the Request for review at the Board was Kshs 205,000/=. It is the Advocate's averment that the Ruling ought to be set aside as it did not take into account relevant matters during taxation.
  7. On its part, the Client opposed the application vide a Replying Affidavit of Ahmessaid Mohamed Abdi sworn on June 6, 2023 wherein it argues that the Advocate's Bill of Costs where they sought Kshs 11,793,571 emanated from the case before the Public Procurement and Review Board. According to the Client it had not instructed the Advocates to either represent them or file the application for review. The client holds that it withdrew the application before it was even heard and contends that the application was filed on April 7, 2017 and through the client's letter dated April 27, 2017 but received on May 2, 2017 when the client withdrew the case.
  8. The Client avers that the Advocate's Bill of Costs was taxed in the sum of Kshs 354,760/= as against Kshs 11,793,571/= which the client holds that it was fair and reasonable, hence the Chamber Summons application ought to be dismissed with costs as it is an abuse of the court process.
  9. The court gave directions for the Reference to be disposed of by way of written submissions. The Advocates submissions dated October 25, 2022 argue that the Ruling which is not dated on the day it was pronounced is a nullity and relied on the case of [Susan Njeri Njoroge v Mwangi Kiarie \[2022\]eKLR](#) in support of this argument.

### **Advocate's Submissions**

10. The Advocates also contend that the Deputy Registrar erred in principle by failing to apply Schedule 11 of the Advocates Remuneration Order 2014 which provides that the Taxing Officer should consider the value of the subject matter, and if the subject matter is unknown then other factors such as the nature and importance of the proceedings, complexity of the matter, time expended by the advocate and the number of documents prepared or perused.
11. The Advocates argue that since the subject matter was ascertainable at Kshs 819,264,953 where the instruction fees under the schedule is Kshs 7,603,111.40. The Advocates thus seek that the High Court adjusts the figures given and not to retax the Bill. They relied on the case of *First American Bank of Kenya Ltd -vs- Gulab P Shab & 2 Others [2002] eKLR*, to buttress the point.

### **Client's Submission**

12. The client's Submissions dated October 4, 2022 holds that the Deputy Registrar was merited in holding that the dispute before the Board was not in respect of the value of the tender but on the process of how the tender was awarded and therefore the decision of the Deputy Registrar was proper and should not be faulted.



13. The Client further argues that the High Court does not have jurisdiction to re-assess a Bill of Costs but to refer the same back to the Deputy Registrar for re-taxation purposes and therefore the application should be dismissed.

### **Analysis and Determination**

14. It is trite law that the High Court has jurisdiction to deal with a taxation related matter as is provided for under Paragraph 11 (1) (2) (3) of the Advocates (Remuneration) Order as follows:-

' Paragraph 11 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.

(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.'

15. The purpose of the High Court is not to interfere with the decision of the taxing officer unless such decision is based on wrong principles. This was the decision of the Court of Appeal case of [\*Peter Muthoka & Anor vs Ochieng & 3 Others \(2019\) eKLR\*](#) it was stated as follows;

' It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with'

16. On the issue whether the court has power to readjust or reassess the Bill, the court's jurisdiction is only limited to referring the same to either the same or different Deputy Registrar but it cannot re-tax it. In the case of *Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory [1970] EA 141*, the Court of Appeal held that:-

' Where a Judge has a discretion to retax a bill himself, where a fee has to be reassessed on different principles it should generally be remitted to the same or a different Taxing Officer.'

17. The next issue for determination is whether or not the decision of the Deputy Registrar should be interfered with. This court agrees with the Deputy Registrar and the Client that the dispute before the board was not in respect of the contract value of the tender but on the tendering process. Therefore, that ought to have been the guide in the assessment of the instruction fees.



18. The court in the case of *Alex S Masika v Epc Builders Limited [2008] eKLR* held as follows,

' Having considered all the issues raised by the Counsel regarding both references before me and the ruling of the Taxing Master, I am satisfied that the Taxing Master did not err. The learned Taxing Master applied the correct principles in assessing the bill. The Taxing Master was correct in my view, not to base the instruction fees on the value urged by the Advocate. As already stated the Advocate was instructed to represent the Client in the Public Procurement Board in which the subject matter was an appeal and application for review of the decision of the Tender Committee of NSSF. The issue before the Board was the decision making process of the Committee and whether the Tender awarded was upholdable. The value of the Client's tender could not be applied to determine the Instruction fee payable to the Advocate, as it was not the value of the subject matter before the Board.'

19. The High court in the case of *Njuguna & Partners Advocates v Bedrock Security Services Ltd [2018] eKLR* while quoting the Alex S Masika v Epc Builders Limited [2008] eKLR held,

' The Holding in that case is in tandem with the holding of this court. The taxing master in this matter under consideration was correct to find that what was before the review board was not the contract amount but the process of the tender award. That process was faulted by the review board which set aside the award and ordered the Judiciary to re-advertise and start afresh the tendering process. The taxing master was, in my view correct in exercising his discretion as provided under paragraph 16 of the Advocates (Remuneration) Order by awarding kshs 200,000 as instruction fee.'

20. Therefore, this court finds that the Deputy Registrar did not err in principle and or in law in exercising her discretion in the ruling under reference to warrant interference by this court. The Chamber Summons Application dated April 20, 2022 is therefore dismissed with costs to the Respondent.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Mwangi counsel for the Respondent

No appearance for the Applicant

