



**KTK Advocates v Nairobi City County (Miscellaneous Application E005 of 2021)
[2023] KEHC 22242 (KLR) (Judicial Review) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E005 OF 2021
M THANDE, J
SEPTEMBER 15, 2023**

BETWEEN

KTK ADVOCATES ADVOCATE

AND

NAIROBI CITY COUNTY CLIENT

RULING

1. Before me for consideration is a reference by way of chamber summons, dated 12.4.22 (the Reference) in which the Applicant seeks the following orders:
 1. That, the Ruling of Hon. T. E. Marienga, the Taxing Master delivered on 29.03.22 pursuant to the Advocate/Client Bill of Costs taxing the Bill in the sum of Kshs. 753,100.20 be set aside.
 2. That, the Advocate/Client Bill of Costs dated 02.03.21 be remitted back for taxation before any other Taxing Master other than Hon. T. E. Marienga.
 3. That, in the alternative, the Learnerd Judge be at liberty to tax the Bill.
 4. That, Costs be provided for.
2. The Reference is premised on the grounds that the Taxing Master erred in principle in taxing the Bill of Costs and that the taxed costs are inordinately low. Further that the Taxing Master erred in law in assessing instructions fee as though she were taxing an ordinary suit yet it was a constitutional petition. The Taxing Master further failed to take into consideration the Applicant's submissions dated 11.03.22, thereby reaching an erroneous decision.



3. In a replying affidavit sworn on 24.2.23 by Eric Obwao, its Ag. County Solicitor, the Client/Respondent argued that the Taxing Master in making the determination in question correctly applied Schedule 6(j) of the *Advocates remuneration Order* (ARO) and considered the factors set out therein. Further, that the Taxing Master considered the cases cited in the submissions by both parties as indicated in paragraph 10 of the ruling. Having considered all the factors and having the benefit of assessing the cause from which the Bill of Costs arose, the Taxing Master proceeded to find correctly, that the amount sought by the Advocate/Applicant was grossly excessive, as indicated in paragraph 17 of the ruling. The Client/Respondent urged the Court to uphold the decision of the Taxing master.
4. The Bill of Costs in question relates to relates to the Advocate/Applicant's representation of the Client/Respondent in Constitutional Petition No. 418 of 2015.
5. The Court has considered the written submissions filed by the parties together with the authorities cited.
6. The Advocate Applicant submitted that the Taxing Master failed to take into account our submissions dated 11.03.22 and thus arrived at an inordinately low figure as to amount to an injustice. This it was submitted, is itself an error in principle. Further that inordinately low fees is unjust and prejudicial to the practice of an advocate. It was further submitted that the Applicant/Advocate acted and successfully defended the Client/Respondent in the petition in which the petitioner was seeking to take away powers of the Respondent as relating to agricultural policy and international trade which would have affected the millions of county residents. The Advocate/Applicant contended that the matter was of great public importance and had the petition succeeded, the Client/Respondent would have lost the power to legislate on agricultural policy and international trade. The decision by the Taxing Master to term the proceedings as mere work-day chores of legal practitioners is therefore misguided as she failed to consider these important factors, which had been highlighted in the submissions. It was further submitted that an advocate's instructions fees are based on the value of the subject matter and its importance to the parties.
7. It is the Advocate/Applicant's further contention that the Taxing Master did not apply her mind to the matter, or disregarded the fact that it was matter of vital interest which affects a large section of the community. She also disregarded principles which were proper for her to consider. Additionally, the Advocate/Applicant submitted that the Taxing Master misapplied her discretion by failing to appreciate the importance and complexity of the subject matter of the Petition as well as the industry put in and time taken on the same. Further, that by failing to exercise her discretion in a reasonable manner through application of settled principles, the Taxing Master, has denied the Advocate/Applicant instruction fees of Kshs. 20,000,000/= as claimed in the Bill of Costs. The Court was urged to consider that the Advocate/Applicant provided valuable services and worked tirelessly to successfully represent the interests of the Client/Respondent. Further that advocates should be fairly, appropriately and justly rewarded for services rendered and skills employed.
8. For the Respondent, it was submitted that the Taxing Master did not err in principle but took into account the complexity of the matter and responsibility by counsel, time spent, skill employed and other attendant documents relied on. As such, the Taxing Master's decision should be maintained.
9. The remuneration of an advocate of the High Court by his client in constitutional matters and the taxation thereof is stipulated in Paragraph 1(j) of Schedule 6 of the *ARO* as follows:

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the



difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

- i. where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
- ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000
- iii. ...

10. As regards advocate and client costs, Schedule 6 provides that the instruction fees shall be the fees prescribed above, increased by 50%. Thus, the instruction fees in a contested constitutional matter, such as the one in respect of which the bill of costs in question was taxed, is Kshs. 100,000/=, increased by 50%. The instruction fees stipulated, is the minimum fees and a taxing officer has discretion to increase the same, taking into the account the factors listed in Paragraph 1(j) of Schedule 6 of the ARO.

11. In her ruling, the Taxing Master indicated that she was guided by the cases of Joreth Limited v Kigano & Associates [2002] eKLR, Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] EA 162 and Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2006] eKLR. She found that the amount sought by the Advocate/Applicant was excessive. She stated:

16. I have carefully considered the factual and legal issues with a view to gauge complexity of issues, importance of the matter, the amount involved, perusal of entire paperwork, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter.

17. Bearing in mind all the aforesaid factors and the reasons herein and in exercise of the discretion vested in me, I am fully convinced that the amount sought by the Advocate is grossly excessive and astronomical.

18. My further analysis of the Petition has not shown anything in the said Petition to have arisen at all above the work-day chores of legal practitioners. It follows, in my view that the responsibility entrusted to counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field.

12. It is trite law that a taxing master has the discretion to increase instruction fees. That discretion must however be guided by known principles. This was the holding of Ojwang, J. (as he then was) in the case of Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2006] eKLR where the learned Judge stated:

The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such



initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.

13. It is the Advocate/Applicant's case that the instruction fee ought to have been increased to Kshs. 20,000,000/=. It was contended that the Applicant/Advocate acted and successfully defended the Client/Respondent in the petition in which the petitioner was seeking to take away powers of the Respondent as relating to agricultural policy and international trade which would have affected millions of county residents. The Advocate/Applicant contended that the matter was of great public importance and had the petition succeeded, the Client/Respondent would have lost the power to legislate on agricultural policy and international trade.
14. The Bill of Costs in question relates to a public law claim, the value of which is not ascertainable. In such circumstances, the Taxing Master was required to use her discretion to assess the instruction fee she considered just.
15. In the case of *Joreth Limited v Kigano & Associates* [2002] eKLR, the Court of Appeal had this to say regarding a subject matter the value of which cannot be ascertained:

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.

16. And in *Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3)* [1972] EA 162 the Court of Appeal outlined the principles governing the assessment of costs as follows:
 - (a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
 - (b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
 - (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and
 - (d) so far as practicable there should be consistency in the award made and
 - (e) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.
17. In the exercise of that discretion, the Taxing Master was required to take 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 as guided by the decision in the *Joreth Limited case (supra)*. The Taxing Master was also required to ensure that the costs allowed would not be so high as to limit access to justice to the wealthy. Further the costs allowed should be such as would fairly reimburse the successful party for costs incurred. Additionally, the Taxing Master must be mindful to make a decision that would attract recruits to the legal profession.
18. In order to convince the court that the claim for increase of the instruction fee was justified, the Advocate/Applicant was required to demonstrate and cogently break down with specificity each of the elements that the Taxing Master failed to take into account, namely the complexity, nature



and importance of the matter, the amount or value of the subject matter, the time expended by the advocate. However, all that was stated was that in the petition, the petitioner was seeking to take away powers of the Client/Respondent as relating to agricultural policy and international trade which would have affected millions of county residents. With respect, this argument by the Advocate/Applicant is too general, to justify interference with the discretion of the Taxing Master.

19. Our Courts have often been called upon to consider the issue of increase of instruction fees. In the case of *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, Ringera, J. (as he then was) had this to say on the subject:

As regards the increase of the instruction fees, I accept that is a matter for the discretion of the Taxing Master. However the decision must be exercised rationally. Now the only reason given by the Taxing Officer here to increase the fees is that the defendants had done some research on the law and they had put in well researched defences. That, to my mind, is not one of the factors for taking into account in increasing the instruction fees. I am of the view that, if a defendant does research before filing a defence and then puts a defence informed by such research, he has done no more than expected. It is nothing extra ordinary. The research is not necessarily indicative of the complexity of the matter. It may well be indicative of the advocate's unfamiliarity with basic principles of law. Such unfamiliarity should not be turned into an advantage against the adversary. The latter would appear to be precisely the case here as the action was based on simple contracts of guarantee. It was a straight forward matter involving application of the facts to basic principles in contracts of guarantee. In that, I can see nothing which would have led the Taxing Officer to increase the instruction fees here.

20. From the material on record, I am in agreement with the Taxing Master that there is nothing that the Advocate/Applicant did that was above the workaday chores of legal practitioners. The responsibility entrusted to counsel in the petition was quite ordinary. It called for normal diligence. Indeed, there is nothing complex about defending a matter where as stated, the petitioner was seeking to take away powers of the respondent relating to agricultural policy and international trade which would have affected millions of people in the county. It has also not been demonstrated that the brief for the Advocate/Applicant in the matter was, in the words of Ojwang, J. (as he then was), so greatly time-consuming, so research-involving, so skill-engaging as to justify an enhanced award of "instruction fees". (See *Samuel Muchiri W'Njuguna* case (*supra*)).

21. It is well settled that this Court should not interfere with the exercise of discretion of a taxing master on the question of quantum, except on an error in principle. The key reason being that the taxing master is more experienced in this area and therefore more apt to the job. In the case of *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, Odunga, J. (as he then was) had this to say concerning the interference of the exercise of discretion by a taxing officer:

Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job;

22. Courts have taken the position that the decision of a taxing master may only be interfered with if the amount allowed is so high or so low as to amount to an injustice to one party or the other. In the case of *Samuel Muchiri W'Njuguna* (*supra*), Ojwang, J (as he then was) cited the following words of Spry,



V-P. in *Premchand Raichand Ltd & Another v. Quarry Services of East Africa Ltd & Another* [1972] EA. 162:

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.

23. Further the Court of Appeal in *Joreth Limited* case (*supra*), cautioned against interference with the assessment of costs by the taxing master unless on a matter of principle. The Court had this to say:

What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

24. In the end and in view of the foregoing, I am satisfied that the Taxing Master, considered the aforesaid well settled principles on increase of instruction fees and properly exercised her discretion in allowing the amount that she did. The Advocate/Applicant has not laid sufficient basis upon which the Court can interfere with the decision of the Taxing Master. In the result, this Reference dated 12.4.22 is found to be lacking in merit and the same is hereby dismissed. The Client/Respondent shall have costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF SEPTEMBER 2022

M. THANDE

JUDGE

In the presence of: -

..... for the Advocate/Applicant

..... for the Client/Respondent

..... Court Assistant

