Republic v Kenya Revenue Authority & 3 others; Five Forty Limited (Exparte) (Miscellaneous Civil Application 420 of 2012) [2023] KEHC 22447 (KLR) (Judicial Review) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22447 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS CIVIL APPLICATION 420 OF 2012

J NGAAH, J

SEPTEMBER 25, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

KENYA CIVIL AVIATION AUTHORITY ..... 2ND RESPONDENT

MINISTER FOR TRANSPORT ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

FIVE FORTY LIMITED ..... EXPARTE

RULING

1. Before court is a reference by the 2nd respondent expressed to be brought under paragraph 11 of the *Advocates (Remuneration) Order, 2014*. The reference is by way of chamber summons and is dated 15 November 2022. It seeks two prayers which have been couched as follows:

    1. The Taxation Ruling dated 03 November 2022 in favour of the Ex-parte Applicant be set aside or varied accordingly

    2. In the alternative, the Ex-Parte Applicant's Party and Party Bill of Costs dated 08 November 2021 be taxed afresh before a different Deputy Registrar".

2. The applicant has also asked for costs.

The application is supported by the affidavit of Kuchio Tindi, who is the 2nd respondent's legal officer.

The facts are not in dispute, and I suppose it is for this reason that all that the ex parte applicant has filed, in response to the application, are grounds of opposition.

At the center of contention is the learned taxing officer's taxation of a bill of costs dated 8 November 2021. It was a party and party bill of costs filed by the ex parte applicant.

I gather from the record that the ex parte applicant asked for Kshs. 44,054, 104.20 as costs. The taxing officer taxed off Kshs. 39, 784,479.20 and awarded the ex parte applicant Kshs. 4,269,625/=

According to the impugned taxation Kshs. 3,000,000/= was awarded as instruction fees. Kshs. 1,000,000/= was awarded as getting up fees being a third of instruction fees. The balance of Kshs. 269,625/= was made of other items.

3. The bone of contention revolves around instruction fees. The applicant's qualm with this assessment is that the taxing officer failed to correctly apply the principles of taxation prescribed in Schedule 6 (1) (j) of the Advocates Remuneration Order, 2009 in taxing the instruction fees at Kshs. 3,000,000/=.

The taxing officer is said to have erred in principle by failing to give sufficient reasons on how the instruction fees of Kshs. 3,000,000/= was arrived at. It is also contended that she misdirected herself on the nature of the proceedings before the Court. According to the applicant, "the proceedings were in respect of a simple and straight forward prerogative order of prohibition against the 1st and 2nd Respondents".

In particular, the taxing officer erred in principle by failing to consider that minimal time was expended on the application as the case was disposed by way of written submissions. In any event, it is contended, the taxing officer ought to have considered a previous bill of costs according to which she had awarded the sum of Kshs. 770,782.00 as party and party costs in favour of the 2nd respondent.

4. According to the 2nd respondent, the taxing officer erred in law by failing to set out any basis for increasing considerably the instruction fees on a matter which was neither complex nor difficult. It is also urged that the matter was of public interest, a fact that the taxing officer ought to have considered.

In its grounds of opposition dated 20 February 2023 the ex parte applicant has urged that the application is misplaced, bad in law and does not disclose any grounds upon which the decision of the taxing officer can be revised. According to the ex parte applicant, the motion before court was not that straight forward but took a lot of time to prepare, file and prosecute. Again, it is urged, the application was not public interest litigation but was more about a public officer exercising impunity by failing to give credit of a colossal sum of money. As far as the previous taxation is concerned, the ex parte applicant urges that it is irrelevant and, in any event, it was not argued before the taxing officer.

In its submissions the 2nd respondent/applicant relied on the case of *Premchand Raichand Limited and Another versus Quarry Services East Africa Limited & Others* (1972) E.A. 162 and *Kenya Power & Lighting Co. Ltd v Msellem* [2022] KEELC 2764 (KLR). In the former case it was held that costs should not be allowed to rise to such levels as to confer access to the court only to the wealthy; that a successful litigant ought to be fairly reimbursed for costs incurred; the general level of remuneration of advocates must be such as to attract recruits to the profession; and, that so far as practicable, there should be consistency in the awards made. In the latter case, while following the decision in the former case, it was stated that no appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal, as a principle, do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself

or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.

5. In the ex parte applicant's case, it was urged, the increase of the instruction fees was so manifestly extravagant that a misdirection of principle is the only possible inference that can be made.

It is also urged that despite making the findings that the proceedings and the substantive suit generally could not be deemed to have been overly complex and that there needs to be consistency in the awards made and also that it is in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants the learned taxing master still made an award that is inconsistent with these principles. In other words, the learned taxing officer did not apply the correct principles to her award.

For instance, in an earlier taxation an award of Kshs. 500,000/= had been made as instruction fees. According to the applicant, it cannot be said that there was consistency when the figure was enhanced to Kshs. 3,000,000/= in a subsequent taxation of a similar party and party bill of costs, in the same matter.

6. On the ex parte applicant's part, it was urged that any decision of a taxing officer must be looked at from the perspective of exercise of discretion by a judicial officer. The case of *Shah –versus- Mbogo* (1968) EA 93 was cited for the submission that, ordinarily, an appellate court will not interfere with exercise of discretion unless it can be shown that there was a misdirection on some matter resulting in a wrong decision or that it is manifest from the case as a whole that the discretion was improperly exercised resulting in miscarriage of justice. Also cited on the same point are the cases of *Thomas James Arthur versus Nyeri Electricity Undertaking* (1961) EA 92 and *First American Bank of Kenya versus Shah & others* (2002) 1 EA 64. The ex parte applicant also relied on the decision in *Joreth Limited versus Kigano & Associates* (2002) eKLR. where the court of Appeal held that:

> 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 ascertainable the taxing officer is entitled to use his discretion to assess 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, and direction by the trial judge and all other relevant circumstances."

7. The ex parte applicant urged that the taxing officer applied correctly the principles set out in the law in coming to the determination she made.

As far as the complexity of the case is concerned, it was urged that the fact that the dispute between parties was eventually settled in the Court of Appeal, is a demonstration enough that the matter was complex. Kshs. 168 Million, being the amount involved in the suit has been described by the applicant as "colossal".

As to whether the taxing master should have considered an earlier taxation in the same matter, it was urged that discretion is personal and does not create a precedent. The learned counsel, however, admitted that this submission is not supported by any authority. In any event, the previous bill of costs was by a party who is said to have played a very "peripheral role in the whole suit."

As to whether the suit was of public interest, it was urged that the suit "was purely a commercial matter in which there was disagreement of quantum and the procedure adopted by the 1st Respondent."

8. In conclusion, it was urged on behalf of the ex parte applicant that the taxing officer correctly applied the principles of taxation and gave her reasons for arriving at the sum awarded. The increase on instructions fees was minimal and cannot be termed as excessive. If anything, it is urged, the amount awarded was excessively low.

Having listened to parties it is apparent that that they are both in agreement that the overarching question in this application is the exercise of discretion by the taxing officer. It is not in doubt that the taxing officer has been clothed with such discretion To be precise, the discretion is encapsulated in schedule VI (1)(j) of the *Advocates Remuneration Order* which is reads as follows:

(j) Prerogative orders -

To present or oppose an application for a Prerogative order; such sum as may be Reasonable but not less than 28,000

Provided that –

(i) the taxing officer, in the exercise of this discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances;

9. The primary question in this reference is whether the taxing officer properly exercised her discretion in enhancing the instruction fees from Kshs. 28,000/= to Kshs. 3,000.000/=.

It is apparent from schedule VI (1)(j) that in exercising his or her discretion, the taxing officer will consider such factors as allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances.

Submissions have been made on the nature and importance of the matter otherwise also addressed as the complexity of the matter. The ex parte applicant's position is that the matter was so complex as to merit substantial fees while the applicant's position is to the contrary. Whatever the case, the discretion of the taxing officer will, one way or the other, be influenced by her decision on whether or not a matter is complexity.

10. Let me start by saying the complexity of a matter may involve examination of both the law and evidence. But a judicial review court may not engage in a detailed examination of factual evidence or re-evaluate the merits of the decision. It may only consider the evidence to the extent that it helps in determining the legality, fairness, and rationality of the decision-making process. The court's role is restricted to ensuring that the decision-maker acted within the bounds of the law and in a procedurally fair and rational manner.

But if the primary issue in a case involves the resolution of disputed facts or the assessment of conflicting evidence, it may be more appropriate to bring the matter before a trial court, in the normal manner where parties can be cross-examined on their evidence for the simple reason that judicial review is generally not the appropriate avenue for resolving disputes over factual issues; its focus is on reviewing the legality and fairness of administrative decisions.

That does not in any way suggest that a judicial review matter cannot be complex. Of course, it can save that irrespective of how complex a matter may be deemed to be, the court's jurisdiction is limited to interrogating the validity of the decision-making process.

11. But as both parties agree, complexity of a matter is just but one of the factors that a taxing officer will consider in exercise of his or her discretion on the extent by which fees payable to a party may be increased. I agree with the decisions that have been cited by both parties in this regard. Indeed, of those decisions, the Court of Appeal ones are binding on this Court.

One of these decisions is *Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR in which the Court of Appeal considered the question of exercise of discretion by the learned taxing officer and circumstances under which the Judge to whom a reference has been made may disturb the exercise of that discretion. In that case, the Court of Appeal noted that the appellant was defending the suit and so the instruction fees as provided in schedule VIA (1) (d) (of the *Advocates Remuneration Order*) was the instructions fees calculated under sub-paragraph (1) (b) of schedule VI subject to the discretion of the taxing officer to increase or reduce the instructions fees. As far as the exercise of discretion is concerned, the Court noted as follows:

> In exercising its (sic) discretion, the Taxing Officer is required to consider the matters specified in proviso (i) of schedule VIA (1) which states:
>
> "Provided that:
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> i. the taxing officer, in the exercise of his discretion shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a discretion by the trial judge, and all other relevant circumstances".

12. The court noted that once a reference is made to the judge, the judge will not interfere with the exercise of the taxing officer's discretion unless she has erred in principle. This is what the Court said:

> On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
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> "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".

13. The court went further to given instances of what may be deemed to be an error of principle to include cases where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles or wherethe taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel (No. 2)*, [1978] KLR 243. Another instance of error of principle is where:

> ...the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1).

14. I am also guided the decision in *Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3)* [1972] EA 162 in which the principles of taxation were outlined 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.

15. In *Joreth Limited v Kigano & Associates* [2002] eKLR, the Court of Appeal acknowledged that in assessing instruction fees, the value of the subject matter is relevant but that there are other considerations to be made where the value cannot be ascertained; the court noted thus:

> 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."

15. Turning back to the taxing officer's decision, there is no doubt the taxing officer appreciated the law and, more particularly, the principles to bear in mind and the factors to consider in exercising her discretion to increase instruction fees. In her ruling, the learned taxing officer noted as follows:

> The discretion granted to the taxing officer must also be exercised judiciously and also subject to the principle of reasonableness. Both parties cited several well-known cases which elucidate the principles governing the assessment of costs."

16. The taxing officer went further and cited the cases of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (*supra*), *Joreth Limited versus Kigano & another* (*supra*) and *Republic versus Minister for Agriculture & 2 Others; ex parte Samuel Muchiri W'Njuguna & 6 Others* (2006) eKLR.

With particular reference to the question of complexity of the case as factor in exercise of the discretion, the learned taxing officer quoted the court in the latter decision where it was held:

> The complex element in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. If novelty is involved in the main proceedings; the nature of it must be identified and set out in a conscientious mode.

17. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry, and was inordinately time consuming, the detail of such a situation must be set out in a clear manner. If large volumes of documentation had, to be clarified, 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".

After considering these decisions, the learned taxing officer came to the conclusion that the case was not "overly complex". This is what she said:

> I have perused the proceedings and the matter cannot be deemed to have been overly complex. The prayers sought were of were prerogatory (sic) in nature..."

She then continued:

> In determining an (sic) instruction fees, it must be related to the value of the work done by an advocate. Advocates should be fairly, appropriately and justly rewarded for their fees (sic) bearing in mind the skill they exercised. 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 the entire paper work, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter.

Bearing in mind all the aforesaid factors and the results herein and in exercise of discretion vested in me, I am fully convinced that the amount sought by the applicant is overly excessive."

18. According to schedule 6(1)(j) of the *Advocates Remuneration Order 2006* which the taxing found to be applicable to taxation of the bill before her, the instruction fees applicable was a minimum of Kshs. 28,000/=. The particular paragraph reads:

> (j) to present or oppose an application for a prerogative order; such sum as may be reasonable but not less than 28,000.

Having considered the relevant principles and factors that ought to have been taken into account in exercising her discretion to increase the instruction and having come to the conclusion that the matter was not 'overly complex' but an application for a prerogative order and that the instruction fees ought not to be excessive, I am unable to appreciate the rationale behind the decision to increase the instruction fees from the basic minimum of Kshs, 28,000/= to Kshs. 3,000,000/=.

19. The taxing master established that the matter was not complex. But even if it was to be assumed it was as the ex parte applicant suggested and, taking cue from the decision in *Republic versus Minister for Agriculture & 2 Others; ex parte Samuel Muchiri W'Njuguna & 6 Others* (*supra*) it was never demonstrated how complex the matter was. It was never shown, for instance,that there was a novel question to be determined; or that the proceedings required a considerable amount of industry. The fact that an appeal was preferred against the decision of this court (Odunga, J. as he then was) does not necessarily imply that the matter was complex. At least the taxing master never thought it to be so merely because the ex parte applicant had successfully appealed against this court's decision on the matter.

It is also apparent from the taxing master's decision that it was never established that the ex parte applicant deployed a considerable amount of industry or that the matter consumed an inordinately long time. Neither was it even suggested in that decision that large volumes of documentation had, to be clarified, assessed and simplified.

One other issue which both parties appreciate and which the taxing master noted as an important factor to consider in exercising her discretion is that of consistency. In other words, there should not be much variance in taxations and, in particular, on such items as instruction fees in matters that are more or less similar. In Premchand Raichand Ltd versus Quarry Services of East Africa Ltd (supra), the court embraced consistency as one of the factors to be considered and noted that so far as practicable, there should be consistency in the awards made.

20. In this particular case, it has been admitted and indeed the record bears this out that the 2nd respondent/ applicant had had a similar bill taxed before the Court of Appeal overturned the decision of Odunga, J. (as he then was). The bill had taxed at Kshs. 770, 782/=. The ruling of the taxing master in the previous taxation was delivered on 12 July 2016 and it is on all fours with the subsequent ruling which is the subject of this reference. The only difference, as far as I can gather, is the amount by which the two

taxing masters increased the instruction fees. The first one increased it by Kshs. 500,000/= but the second master increased it by almost Kshs. 3,000,000/=.

There is certainly no consistency here. There would be no basis of an ex parte applicant being awarded a higher figure than the amount awarded to the respondents or any of them because according to schedule VI (1)(j) the assessment of instruction is applicable in presenting or opposing an application for a prerogative order. There is no suggestion of any preference of one party over the other.

It follows that there cannot be any viable reason or justification why one particular taxing master's taxation of a bill of costs should be far removed from taxation by a different taxing master of a similar bill of costs in the same matter. In short, the ruling of the taxing master in the impugned taxation lacked consistency.

The interest of the parties is also another factor that the taxing officer ought to have taken into account, but which she did not. The 2nd respondent is a public body and, by its very nature, it is funded by the tax payer and it is established to serve public interest. The amount awarded against it is ultimately borne by the tax payer. It is certainly not in the public interest that the tax payer should bear excessive costs in litigations.

21. Finally, the taxing master erroneously concluded that the matter took five years. This is what she said:

> The application was filed in the year 2012 and concluded in the year 2017. The same was concluded within 5 years."
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> The taxing master here misdirected herself on the facts because the record shows that the matter did not take that long. It is apparent that it was filed on or around 26 December 2012 and was concluded on 16 January 2015 when the court delivered its judgment. This was about two years.
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> The conclusion that I can make is that as much as the taxing master appreciated the principles and the factors to consider in exercise of her discretion, she did not apply them and hence erred in her decision. I agree with the applicant that her exercise of discretion was inconsistent with the principles of taxation and the factors to be taken into account in exercise of discretion to increase the instructions fees.

22. I would agree with the decision in Mbogo versus Shah (supra) that the appellate court cannot interfere with exercise of discretion, unless it can be shown that there was a misdirection on some matter resulting in a wrong decision. In this case there is evidence that the learned taxing officer misdirected herself on facts and reached an erroneous conclusion.

Again, on the same point, I would take cue from the decision in *Kenya Power and Lighting Ltd versus Msellem*(*supra*) where it was held that if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.

23. For the reasons I have given I am inclined to reach the conclusion that the increase of the instruction fees by a margin of almost Kshs. 3,000,000/= when there is no legal or factual basis for such increase is in itself a manifestation of improper exercise of discretion. The learned taxing officer appreciated that the ex parte applicant had asked for Kshs. 44,000,000/= which in her respectable view was excessive. Indeed, the amount was excessive taking all the relevant considerations into account. But in reaching the appropriate assessment on instruction fees, it is not really by how much the bill is taxed off that matters; what counts is the extent of the increase by the taxing officer on the minimum instruction fees. The taxing officer's exercise of discretion ought not to be influenced by what a party seeks, but by the scale of fees as prescribed in the Advocates Remuneration Order and, of course, by the principles

of taxation and other necessary factors prescribed in the proviso (j) to schedule VIA (1) as justice in any particular case require.

In conclusion, I would allow the applicant's application and remit the matter for taxation afresh of the ex parte applicant's bill of costs. The taxation will be done by taxing officer different from the one who taxed the impugned taxation. The taxation will be restricted to instruction fees and getting up fees and in exercise of his or her discretion the taxing officer is directed to apply the principles of taxation and the factors prescribed in proviso (j) to schedule VIA (1) of the *Advocates Remuneration Order*.

In making this order, I follow the decision of the Court of Appeal in *Kipkorir,Titoo & Kiara Advocates v Deposit Protection Fund Board* (*supra*) where it was held:

> And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D'Souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji v Kanji Naran Patel (No. 2) (supra)."

24. In *Joreth Limited v Kigano & Associates* [2002] eKLR the same Court of Appeal was more emphatic that a judge ought not to retax a bill where he comes to the conclusion that the taxing officer erred in principle. The court noted as follows:

> Besides it is not really in the province of a judge to retax the bill. If the judge comes to the conclusion that the taxing master has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. It was stated by the predecessor of this Court in the case of Steel Construction & Petrol eum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141 per spry JA at page 143:
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> "Counsel for the appellant submitted, relying on D'Souza v. Ferao [1960] EA 602 and Arthur v. Nyeri Electricity Undertaking [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re -assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."

Parties will bear their respective costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 25 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE