



Mbondo & another v Muttisya & Company Advocates (Miscellaneous Application E005 of 2023) [2023] KEHC 23727 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E005 OF 2023**

FR OLEL, J

OCTOBER 16, 2023

**IN THE MATTER OF ADVOCATE/CLIENT BILL OF COSTS
UNDER THE ADVOCATES REMUNERATION ORDER OF
THE ADVOCATES ACT (CAP 16 LAWS OF KENYA)**

BETWEEN

SERAH MUTHIO MBONDO 1ST APPLICANT

RICHARD MUEMA MBONDO 2ND APPLICANT

AND

MUTTISYA & COMPANY ADVOCATES RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 23rd January 2023 brought pursuant to provisions of Section 1A, 1B, and 3A of the *Civil Procedure Act* 2010, Rule 11 of the *Advocates (Remuneration) order*; Order 50 Rule 4, Order 51 Rule 10 of the *Civil Procedure Rules* and all other enabling provision of law. The main prayers sought for in the said application are that;
 - a. That this court be pleased to hear, determine and allow the clients/Applicants objection dated 28th November 2022.
 - b. That this Honourable court be pleased to set aside the decision of the Honourable taxing officer dated 16th November 2022 and the same be taxed afresh by this court.
 - c. That in the alternative, this Honourable court be pleased to order that the respondents bill of costs be taxed afresh by another taxing master.
 - d. That costs of this application/reference be provided for.



2. This application was supported by the grounds on the face of the said application and the supporting affidavit of Richard Muema Mbondo. He did aver that the taxing master did tax the advocate/client bill of costs and delivered his ruling on 16th November 2021. Being aggrieved by the said decision, he did seek for reasons for the decision reached and upon receiving a reply from the court on 20th December 2022, his counsel proceeded to file this reference.
3. The applicant wholly relied on the facts stated in his affidavit filed in opposing the said taxation, where they denied instructing the respondent/advocate to act for them in Succession No 3 of 2017, In the matter of the Estate of Elijah Mbondo Ntheketha. The applicant / advocate was acting for the first family/house, who were different parties in the said cause, while they had instructed the firm of Stella Muendo advocate to represent them. The applicant was therefore not entitled to be paid any sum claimed in the bill of cost as filed.
4. This application was opposed by the respondent, who filed his replying affidavit dated 19th April 2023. He averred that the applicant did instruct him and he file his notice of appointment to act for them on 27th September 2013. He diligently acted on their instruction, attended many court sessions and had the applicants sign various affidavits, and pleadings' which he annexed to support this contention. During the period of representation, the applicants never did raise any objection with respect to the work done. His costs were thus properly taxed and he was entitled to be paid for the professional work undertaken.

B. Analysis & Determination

5. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the issues for determination are; if the reference is filed within time and whether the advocate/client bill of costs was properly taxed as provided for in law and/or if it should be set aside and be referred back for re- taxation before a new Taxing master.
6. Section 11(1) of the [Advocates \(Remuneration\) Order](#) does provide that;

“should a 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 terms of taxation to which he objects.
7. Section 11(2) of the [Advocates \(Remuneration\) Order](#) does provide that;

“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 concern, setting out the grounds of his objection.”
8. The taxing master did give his reasons for taxation *vide* his letter dated 20th December 2022. By dint of provisions of Order 50 rule 4 of the [civil procedure rules](#), time stopped to run from the said 21st December 2022 to 13th January 2023. The applicant did file his reference on 24th January 2023, which was within the fourteen (14) days stipulated period as provided for in law. This reference was thus filed with time and is properly placed before this court for determination.
9. Secondly the applicants did challenge instructions and stated that the advocate was acting for the first family and their advocate was one advocate/applicant, who sufficiently showed that he acted for the client/applicants, attended court on their behalf and even placed before court various pleadings drawn by him and signed by both clients. The said pleadings were presented in court on their behalf and on



their instructions. It is thus clear that the client's contention the advocate/respondent never acted for them is an afterthought and a red herring.

10. Further during the preliminary hearing, the clients/applicants did not raise their objection on the issue of retainer. Indeed, the right procedure would have been to raise it as a preliminary issue and have a determination made thereof. This would have been based on Section 13A of the *Advocates Remuneration Order*. Also see the decision of the court of Appeal in *Wilfred N Konosi t/a Konosi & co advocates v Flamco Limited* NRB CA Civil Appeal No 154 of 2014, where the court held that;

“As a judicial officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client bill of cost must be determined at once. The taxing officer has jurisdiction to determine that question. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction.”

11. On the taxation itself, it is now trite law that the High Court will only interfere with the decision of a Taxing Master in cases where there has been shown to be an error in principle. In *Republic v Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna* [2006] eKLR, Ojwang J. (as he then was) expressed himself inter alia as follows:

“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, 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...The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularized justification of the mode of exercise of any discretion provided for... 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...”

12. Mativo J. in *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR held that:-

“ 19. It is trite that the court will not interfere with the exercise of the taxing master’s discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue.”

13. The Supreme Court of Uganda (Mulenga, JSC) in *Bank of Uganda v Banco Arabe Espaniol*, Civil Application No. 29 of 2019 stated that:

“...Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...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.”

14. The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. The application as filed does not bring out any error based on the above principles. The sums taxed too are reasonable and within the relevant scale.

C. Determination

15. The upshot is that the reference as filed is wholly unmerited and the same is dismissed with costs.

16. The costs are assessed at Kshs 40,000/= all inclusive.

17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 16th day of October, 2023.

In the presence of;



.....Applicant
.....Respondent
.....Court Assistant

