



Ransley McVicker & Shaw Advocate v Holroyd & 2 others (The Administratrixes of the Estate of the Late Dipa Jashbai Pulling - Deceased) (Judicial Review Miscellaneous Application E198 of 2021) [2024] KEHC 12198 (KLR) (Judicial Review) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12198 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E198 OF 2021
J NGAAH, J
OCTOBER 11, 2024
N THE MATTER OF THE TAXATION OF AN AMENDED ADVOCATE
- CLIENT BILL OF COSTS IN NAIROBI JR NO. 129 OF 2009

BETWEEN

RANSLEY MCVICKER & SHAW ADVOCATE ADVOCATE

AND

MINAR KATHERINE HOLROYD 1ST CLIENT

SUNEINA LEONORA PULLING 2ND CLIENT

LAURA SUSHILA PULLING 3RD CLIENT

**THE ADMINISTRATRIXES OF THE ESTATE OF THE LATE DIPAJASHBAI
PULLING - DECEASED**

RULING

1. The applicants' application is a chamber summons dated 28 March 2024 brought to court under sections 1A, 1B, 3A of the *Civil Procedure Act* Cap. 21 and paragraph 11(1) & (2) of the *Advocates (Remuneration) Order 2014*. The applicants seek the following orders:

- “1. There be a stay of execution of the Taxing Officer's Ruling issued on and dated 21 March 2024 taxing the Respondent's Amended Advocate/Client Bill of Costs dated 3 November 2023 at Kes 11,867,461.20 pending the hearing and determination of the Application hereto.



2. The Taxing Officer's Ruling issued on and dated 21 March 2024 taxing the Respondent's Amended Advocate/Client Bill of Costs dated 3 November 2023 be hereby set aside in its entirety.
3. The Respondent's Amended Bill of Costs dated 3 November 2023 be hereby taxed by a different Deputy Registrar in the Division."

2. The applicants have also asked for the costs of the application.

The application is supported by the affidavit of Ms. Minar Katherine Holroyd who swears that she is a co-administratrix of the Deceased's Estate.

The applicants were respondents in a Judicial Review Application no. 129 of 2009. They were previously represented in that suit by the respondent which, as its name suggests, is a firm of advocates.

3. According to the Ms. Holroyd, on 21 March 2024, the Taxing Officer, rendered a ruling according to which she taxed the Respondent's Amended Advocate/Client Bill of Costs dated 3 November 2023 at Kes 11,867,461.20. The applicants are aggrieved by the taxation on the grounds that:

- a. The Taxing Officer went outside the scope of the Advocate/Client taxation proceedings and condemned the Applicant unheard by irregularly relying on a Certificate of Costs dated 19 March 2024 (the Impugned Certificate of Costs) emanating from a separate and distinct Party and Party Taxation between the *ex parte* Applicant (Suchan Investments Limited) and Sandeep Desai (as the 2nd Respondent) as the basis for impugned Ruling.
- b. The Taxing Officer ought to have relied on a Consent that was duly recorded between the *ex-parte* Applicant (Suchan Investments Limited) and the Applicant hereto (the Estate of the late Dipa Pulling) on 22 May 2023 in Nairobi JR No. 129 of 2009, which fixed the Party and Party Costs between the Applicant and the *ex parte* Applicant at Kes 1,700,000 (the Consent Order).
- c. The Taxing Officer erroneously applied Schedule 68 (a) of the *Advocates (Remuneration) (Amendment) Order 2014* (the ARO) instead of Schedule 68 (c) of the ARO which was more appropriate due to the existence of the Consent Order which remains in full force and effect. In this case, Instruction fees, as guided by Schedule 68 (c) of the *ARO*, would be a total Kes 2,550,000 and not Kes 6,820,380 as held in the impugned Ruling.
- d. Even if the Court were to somehow find that the Impugned Certificate of Costs as opposed to the Consent Order is the correct basis for any Advocate/Client taxation between the Parties hereto, the Applicant's liability as regards the Impugned Certificate of Costs would only be 1/3 as the other relevant parties in Nairobi JR No. 129 of 2009 were the Ministry for National Heritage & Culture (as the 1st Respondent) and Sandeep Desai (as the 2nd Respondent). In such a case, the instruction fees as guided by Schedule 68 (a) of the *ARO* would be Kes 3,376,088.10 (2,250,725.40 + 1,125,362.70 representing 50% of 2,250.725.40)."

According to the applicants, the award of Kshs. 11,867,461.20 is inordinately high and inconsistent with a consent order entered with respect to the instruction fees.



4. The respondent apposed the application and replying to this end is sworn by Ms. Wangui Shaw who swears that she is the surviving partner in the Respondent/Advocates firm of advocates. The learned counsel has sworn that the taxation of the Respondent's initial amended bill of costs was set aside by this Honourable Court. Subsequently, and while it was pending for re-taxation, a party and party bill of costs in High Misc. JR 129 of 2009 was taxed in March 2024 and certificate of costs issued.
5. It is the learned counsel's position that once the party and party taxation was determined and a certificate issued, the Taxing Master's jurisdiction was limited to a taxation under Schedule 6 (B) of the Remuneration Order and that she was thereby deprived of the discretion to tax the bill apart from adding the Party and Party costs plus one half.
6. Counsel has also sworn that upon discovery of this taxation, she took the initiative and wrote a letter dated 18 March 2024 to the court to inform the Taxing Officer of the existence of this taxation. Even then, counsel has conceded that the Taxing Master was not bound to discharge her duties in accordance with the letter.
7. With respect to the contention that the proper schedule to that Taxing Officer ought to have been guided by was Schedule 6 (B) paragraph (c) counsel has sworn that the consent letter dated 3 March 2023 and adopted by the court on 22 May 2023 was entered into by the Applicants and parties other than the Respondent. That being the case, the Respondent's right could not have been compromised without its involvement.
8. On the applicant's contention that all that is due to the applicant from the client is a third of its fees, Ms. Shaw has sworn that the order on party and party costs was to be executed on the basis of the 1/3 ratio in favour of Suchan Investment Limited (which was the ex parte applicant in application no. 129 of 2009) against the other parties. The advocate/client costs were, however, different because the advocate firm could only recover its fees from its client who was then named as Dipa Pulling (now deceased) and who was the 3rd respondent in those proceedings.
9. I have considered the submissions by both the applicants and the respondent. There is nothing more in those submissions than what the parties have stated in their respective affidavits. The basis of the applicant's first ground against the Taxing Officer's taxation is found in the second page of the taxing Officer's ruling where she held as follows:

“I have considered the submissions by both parties as well as the (sic) issued by the Honourable Justice J. Ngaah. I do note that a certificate of costs dated the 19th of March 2024 in the sum of Kshs. 6,820,380/- was issued following the re-taxation of the party and party bill of cost (sic) in JR No 129 of 2019; which forms the basis of the instructions leading to the filing of the advocate client bill of costs that is before me....I therefore proceed to tax the bill before me as guided by the provision of schedule 6B of the ARO as follows:

The amount awarded for the party and party bill of costs dated 10th May 2016:

Kshs. 6,820,280/-

Increased by half: 3,410,190/-

Total: 10,230,570/-”
10. What the learned Taxing Officer did, in effect, was to adopt the amount she certified as the instruction fees in a party and party bill of costs as the instruction fees in the respondent's advocate and client bill of costs.



11. In my humble view, there is no legal basis upon which the Taxing Officer could possibly have adopted the amount certified in the certification of costs (it actually ought to be a certificate of taxation) dated 19 March 2024 as the instruction fees applicable in the respondent’s bill of costs. This is because the “certificate of taxation” was with respect to the taxation of what is clearly stated in that certificate as the party and party bill of costs dated 16 May 2016.

The respondent’s bill of costs, on the other hand, was an advocate/client bill of costs dated 21 December 2021 and amended on 3 November 2023.

12. The substantive suit out of which the bill arose being a judicial review application, the learned Taxing Officer was bound to tax the respondent’s bill of costs as a separate and distinct bill of costs as she is so enjoined Schedule 6.(1)(j) which reads as follows:

“(j) Constitutional petitions and prerogative orders

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— (Emphasis added).

13. The learned Taxing Officer could not be said to have exercised her discretion, as required under this paragraph, in assessment of the advocate’s instruction fees when she merely adopted instructions fees certified in a party and party bill of costs.

14. It is also important to note that according to this paragraph of the *Remuneration Order*, the learned Taxing Officer is enjoined to take into account factors, such as 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.

15. It is apparent that the learned taxing officer had this paragraph in mind when she taxed the party and party bill of costs where she noted as follows:

“I do note however the great interest of the parties in the suit noting the value of the subject matter the nature of the suit before court the time taken in the volume of documents which is large as well as the skill employed by the counsel leading to the decision in favor of the applicant. This is a matter that was done both in the High Court and in the Court of Appeal therefore counsel employed high level of skill and knowledge leading to the overturning of the decision of the High Court.”(Emphasis added).

16. While such factors as the interest of the parties and the value of the subject matter may be common in the bill of costs that may be filed by any of the parties, or by advocates against their clients, there is no doubt that the time taken in preparation of the matter, depending on the nature of the brief each individual advocate is given, and the volume of documents they will file vary from one counsel to another. The efforts put in by the individual counsel will also vary. On the whole, the circumstances that would ordinarily sway a taxing officers’ discretion to increase or decrease instruction fees will vary from one party to another and from one advocate to another.

17. If the learned Taxing Officer found that the counsel for the applicant, for instance, put so much efforts that the applicant’s application succeeded, and even had the judgement of this Honourable Court overturned in the appellate court, she may perhaps, not say the same of the respondent’s counsel.



However, this does not necessarily imply that the counsel for the respondents in the substantive suit did not put in as much efforts or even more efforts than the applicant's counsel. The respondents' case may have failed only because it fell on the wrong side of the law and, therefore, irrespective of how much efforts the respondents' counsel invested in terms of preparation, time, skill and efforts, the result would not have been any different.

18. The point is this: in the absence of a remuneration agreement, in which event an advocate has to justify his fees, the advocates bill of costs must not only be taxed but it must also be seen to have been taxed. In the instant case, it is possible that the learned Taxing Officer may, in exercise of her discretion, have come to a more or less the same figure as instruction fees after assessment of both the party and party bill of costs and the advocate and client bill of costs; however, both bills must be seen to have been taxed independently, as a separate and distinct bills of costs.
19. But even if the Taxing Officer was entitled to adopt the instruction fees in the party and party bill of costs, the figure she applied in the respondent's advocate/client bill of costs was not just the instruction fees assessed in the former bill. It was the total award which included instruction fees, attendances and disbursements. This is apparent from her own ruling where, as noted, she held as follows:

“The amount awarded for the party and party bill of costs dated 10th May 2016:
Kshs. 6,820,280/-
Increased by half: 3,410,190/-”
20. For the record, the instruction fees in the bill dated 10 May 2016 was assessed at Kshs. 5,000,000 and this is the amount that she would have adopted as instruction fees in the taxation of the advocate/client bill of costs, assuming it was open to her to adopt that figure. The total amount awarded as taxed costs could not certainly pass off as instruction fees.
21. There is no merit in the rest of the grounds on which the applicants' reference is based. As far as the consent of 22 May 2023 is concerned, the letter that originated the consent and the proceedings in which the consent was adopted show that the respondent/advocate was not privy to the consent.
22. To begin with, the consent letter dated 3 March 2023 was authored by Omamo & Company Advocates, for the 3rd respondent, and AGN Kamau Advocates, for the *ex parte* applicant. The letter was addressed to the Deputy Registrar and was in the following terms:

- “1. For the avoidance of doubt, the 3rd respondent estate is only liable to pay the *ex parte* applicant Kes 4,495,682 representing one-third of the costs totaling Kes 13,487,046 as indicated in its certificate of costs dated 16th October 2019.
2. The *ex parte* applicant to pay the 3rd respondent costs of Kshs. 150,000/= being the agreed costs in respect to the *ex parte* applicant's application dated 7th December 2021.
3. The *ex parte* applicant to pay the 3rd respondent agreed costs of Kshs. 150,000/= in respect to the agreed costs in respect of the *ex parte* applicant's application dated 2nd March 2020.
4. The 3rd respondent hereby agrees to pay the *ex parte* applicant the agreed costs of Kshs. 2,000,000/= representing the agreed share of the 3rd respondent's costs in the above case out of the taxed costs contained in the certificate of cost dated 16th October 2019.
”


5. In view of the above it is now mutually agreed between the 3rd respondent estate and the ex parte applicant that the 3rd respondent will pay the ex parte applicant the net sum of Kshs. 1,700,000/= which payment shall constitute the full and final settlement of its liability to the *ex parte* applicant.”
23. The record of proceedings in which the consent was subsequently adopted as the order of the court reads as follows:
- “22/05/023
- Before Hon. Justice J. Ngaah
- Mr. Leshan for the 2nd respondent
- Ms. Mbirwe for the applicant
- Ms. Omamo for the 3rd respondent
- Ms Mbirwe for AGN Kamau for the applicants:
- The settlement has been reached between the applicant and the 3rd respondent as full settlement.
- Ms. Omamo:
- We filed a consent between the applicant and the 3rd respondent. The consent letter dated 3/3/2023. We pray that the same is marked as the order of the court.
- Court:
- The Consent contained in the letter between the applicant and the 3rd respondent is adopted as the order of this honourable court. The applicant to deliver a hard copy of the letter to the registry.”
25. It is thus clear that the respondent/advocate was not only not party to the consent letter that yielded the consent order but was also not in court when the consent was adopted as the order of the court.
26. In these circumstances, the agreement between the ex parte applicant and one of the respondents in settlement of party and party costs cannot be said to bind the advocate in assessment or taxation of the latter’s bill of costs. And certainly the consent to which the advocate/respondent was not privy cannot be the basis for the argument that the respondent is only entitled to a third of the costs due to it from the applicant. That argument would lead to a rather absurd conclusion that the rest of the respondents share in the responsibility of the applicants’ obligations towards their own advocate.
27. There shouldn’t be any doubt that the advocate/client relationship is a contractual relationship and it is, of course, trite that only parties to a contract are bound by its terms. This is why under section 45(1) (a) of the *Advocates Act*, cap. 16, an advocate and his client may enter into an agreement and fix the amount of the advocates remuneration in any contentious business. This section reads as follows:
- “45. Agreements with respect to remuneration
- (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—



(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof."

25. And where no agreement exists, section 47 of the *Act* gives the court power to make an order for the delivery by an advocate of a bill of costs to the client. As a matter of fact, section 48 of the *Act* says that no suit for the recovery of any costs due to an advocate or his firm may be brought until the bill of costs has been delivered to the client. Section 48(3) is also clear that the bill of costs between an advocate and a client may be taxed notwithstanding no suit for recovery of costs has been filed.
26. All these provisions go to show that it is not open to a party in a suit to drag other parties with whom he has been sued into a contract between the client and his advocate and to which, obviously, the rest of the parties are not privy. In the instant application, the parties who were sued together with the advocate's previous client have no obligation to bear the applicants' burden of paying the remuneration due to their advocates.
27. For the reasons I have given, I hereby allow the application but only for the reason that the Taxing Officer adopted instruction fees which, in any event, was the total costs awarded, in party bill of costs dated 10 May 2016 as the instruction fees applicable in the respondent's advocate/client bill of costs dated 21 December 2021 but amended on 3 November 2023, without taxing it.
28. I will, therefore, remit the respondent's advocate/client bill of costs back to the Taxing Officer to tax it afresh with respect to the items of instruction fees and getting up fees. Considering the numerous occasions that the bill of costs has oscillated between various Taxing Officers and the court, and in order to avoid any further delay in the taxation of the bill of costs, I direct that the re-taxation be undertaken forthwith and, in any event, not later than 30 days from the date of this ruling. Parties will bear their respective costs. Orders accordingly.

SIGNED DATED AND DELIVERED ON 11 OCTOBER 2024

NGAAH JAIRUS

JUDGE

