



Wamaitha Makori & Co. Advocates v Kimani (Miscellaneous Application E330 of 2023) [2024] KEHC 12414 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E330 OF 2023
PN GICHOHI, J
OCTOBER 16, 2024**

BETWEEN

WAMAITHA MAKORI & CO. ADVOCATES ADVOCATE

AND

JOSEPH MBUU KIMANI CLIENT

RULING

1. By a Chamber Summons dated 28th September 2023 brought under Section 11 (1) & (2), Rule 11, Rule 50 A of the [Advocates \(Remuneration\) Order](#), Section 1A, 1B and 3A of the [Civil Procedure Act](#), Article 159 of the [Constitution](#) of Kenya, the Advocate/Applicant seeks orders: -
 1. That this Honourable Court be pleased to vary and /or set aside the ruling of the Deputy Registrar, N. Makau in the matter of Advocate- Client bill of costs dated 30th January 2023 between the aforementioned parties.
 2. That this Honourable Court be pleased to order that the Advocate- Client bill of costs dated 30th January 2023 be placed before another Taxing Officer for taxation.
 3. That in the alternative, this Honourable Court do exercise its discretion and tax the Applicant's bill of costs dated 30th January 2023.
 4. That the Advocate/ Applicant be awarded the costs of this application.
2. The grounds on the face of the application and supported by the Affidavit sworn by Rosalind M. Wamaitha Advocate can be condensed as follows: -
 1. The Learned Taxing Officer erred in law and misdirected herself in principle in failing to appreciate that the bill presented before her was advocate -client bill of costs and not party and party bill of costs hence arriving at a wrong conclusion.



2. The Learned Taxing Officer erred in law and misdirected herself in principle by failing to consider the Applicant's advocate -client bill of costs.
 3. The Learned Taxing Officer erred in law and misdirected herself in principle in striking out the Applicant's bill of costs on the ground that the subsequent firm was the only one which was supposed to file a bill failing to appreciate that the bill presented before her was advocate -client bill of costs and not party and party bill of costs hence arriving at a wrong conclusion.
 4. The Learned Taxing Officer erred in law and misdirected herself in principle in failing to appreciate that the Applicant does not have to depend on the Advocate on record to recover his fees for him.
 5. The Learned Taxing Officer erred in law and misdirected herself in principle in disregarding the value of the subject matter being one of the most important consideration in establishing the instruction fees due to the Applicant.
 6. The Learned Taxing Officer erred in law and misdirected herself in principle in failing to appreciate that the Advocate-client bill of costs was meant for the professional fees for the services rendered.
 7. The Learned Taxing Officer failed to appreciate that the firm of Muigai Gatei never served any notice of appointment and/or notice of change of advocates upon the Applicant and that even the notice of withdrawal of the matter was addressed to the firm of Ashitiva & Associates Advocates.
 8. The Learned Taxing Officer erred in law and misdirected herself in principle by stating that the Plaintiff's suit had been dismissed with costs when the same was withdrawn with costs to Defendant.
3. The Applicant therefore states that in the interest of justice, the "Learned Taxing Office's taxation in the ruling of 19th September 2023 should be set aside and that this Court be pleased to tax the Bill of Costs or remit it to another Taxing Officer for taxation."
 4. The Client/Respondent opposed the application by filing a Replying Affidavit sworn by Joseph Mburu Kimani on 28th May 2024 and filed on 29th May 2024 through the firm of Murunga Mwangi & Associates Advocates.
 5. His position is that the Deputy Registrar (Taxing Officer) exercised her discretion judiciously and taxed the Bill of Costs in accordance with the relevant provisions of the Advocates Remuneration Order and therefore the Ruling dated 19th September 2023 should be allowed to stand.
 6. He states that if the Applicant was aggrieved, then within 14 days, she ought to have given notice in writing under Paragraph 11 (1) of the [Advocates Remuneration Order](#) in regard to the items she objected to but that was not done thus making the Reference incompetent.
 7. The Respondent further states that the letter dated 22nd September 2023 annexed to the Applicant's Supporting Affidavit merely requested for the ruling and reasons for taxation and did not identify any item of taxation that the Applicant was objecting to.
 8. For those reasons, the Respondent argued that the letter is not a valid Notice of Objection to Taxation and therefore, this Court lacks jurisdiction to entertain this application. As a consequence, the Respondent urged the Court to dismiss the application with costs to him.



9. Though the Applicant sought and was allowed by this Court to file a supplementary Affidavit, none have been filed. Further, the Applicant was alerted by this Court that her submissions were not in the file and she undertook to avail a hard copy to the Court but she did not do it and did not attend Court on the scheduled date which was taken by consent of parties.

Respondent's Submissions

10. His submissions are dated 20th June 2024 and filed on 25th June 2024 and while relying on Paragraph 62 A of the Advocates Remuneration Order and High Court decision in *Hanzaali Jiwaji v The Lamu Dreams Limited* [2011] eKLR, he submitted that the Taxing Officer properly ruled that the Bill filed by the Applicant herein was filed after change of Advocate and therefore offended the provisions of Paragraph 62A, and in the circumstances, the Taxing Officer exercised her discretion judiciously.
11. As a consequence, the Respondent submitted that there are no valid grounds advanced by the Applicant to warrant his Court's interference with the Taxing Officer's decision. Lastly, he urged the Court to dismiss the Applicant's Chamber Summons with costs.

Analysis And Determination

12. This Court has considered the Application, Affidavit in support and annexures thereto, the Replying Affidavit and the submissions by the Respondent. The main issue for determination is whether the Taxing Officer erred in law and in principle in the taxation leading to dismissal of the Applicants bill of Costs dated 30th January 2023.
13. The Court has also accessed the High Court file being HCC No. 11 of 2022 (formerly ELC E 88 of 2021) Joseph Mburu Kimani (Plaintiff) versus Family Bank Limited (Defendant).
14. That record shows that indeed, the case was originally filed before the Environment and Land Court Nakuru before it was transferred to High Court Nakuru vide a Ruling by L.A. Omollo J dated 10th March, 2022. On record for the Plaintiff was Wamaitha Makori & Co. Advocates while Maina & Onsare Partners Advocates LLP were for the Defendant.
15. On 23rd June 2022, the firm of Muigai Gatei & Co. Advocates filed a Notice of Change of Advocates dated 22nd June, 2022 replacing the firm of Wamaitha Makori & Co. Advocates for the Plaintiff. The record further shows that on 26th July 2022, the said firm filed a Notice of Withdrawal of the Plaintiff's suit wholly.
16. The following day, and in the presence of both advocates on record, the case was marked as withdrawn with costs to the Defendant and pursuant to that withdrawal, two Advocate -Client Bill of Costs were filed against Joseph Mburu Kimani (Client) but at different dates.
17. The first one was by Wamaitha Makori & Co. Advocates for the Applicant dated 30th January 2023 and filed on 31st January, 2023 against Joseph Mburu Kimani. The second one was by Muigai- Gatei & Co. Advocates which is dated 19th July 2023 and filed on 21st July 2023 against Joseph Mburu Kimani.
18. The record further shows that submissions were filed by both parties therein. The firm of Muigai-Gatei & Co Advocates submissions dated 19th July 2023 were in opposition to the Bill of Costs drawn by the firm of Wamaitha Makori & Company Advocates. The ground was non- compliance with Paragraph 62 A of the Advocates Remuneration Order which provides that the Advocate last on record should draw a single bill encompassing the entire matter for which costs have been awarded.



19. They proposed “that a revised Bill should be filed, consistent with Paragraph 62A of ARO, incorporating a consolidated account of the services provided by both firm throughout the proceedings.” However, they went on to submit on their Bill and made proposals on each of the items drawn. They urged that the Advocate/Client Bill of Costs be taxed as drawn by them but not as drawn by the firm of Wamaitha Makori & Company Advocates.

20. In her Ruling the Taxing Officer had this to say: -

“Party and Party bill of Costs filed in court on 30th January 2023. The same is opposed. I have considered the bill of costs, the supporting documents as well as the submissions filed in opposition of the bill of costs...Bearing the foregoing in mind and the judgment by the court, the Plaintiff’s suit was dismissed with costs and looking at the prayers before Court value of the subject matter cannot be ascertained as such Schedule 6 of ARO provides under other matters a fee of Kenya shs. 75,000/- and considering the submissions by the firm of Gatei which I agree with on part of representation and provisions of Paragraph 62A advocate finally on record is responsible for preparing a single as such I proceed to strike out the bill of costs filed by the firm of Wamaitha Makori dated 30th of January 2023 and proceed to tax the bill of costs filed last and on instructions fees to be shared between the two firms and the difference on the other items on the party that filed and or was present in court during the proceedings.” [Emphasis added]

21. From the submissions by counsel for the Client herein and the Taxing Officer’s reasoning, it is evident that the said Bills of costs treated as though they were party and party bill of costs yet they were not.

22. Being an Advocate /Client Bill of Costs, the Advocate /Applicant did not have to wait for conclusion of the case to file her Bill of Costs against the Client who chose to change her for another firm of Advocates.

23. Indeed, while referring to Paragraph 62 A (1) of the Advocates Remuneration Order, the Court of Appeal in *Machira & Co. Advocates v Arthur K. Magugu & another* [2012] eKLR held: -

“Save for interlocutory applications, costs are normally not awarded until the determination of the matter. That being the case, the above provision clearly refers to party and party costs and not to advocate/client costs. As Justice Ringera observed, the objective behind the provision is to shield litigants from being “burdened with costs incurred as a result of change of advocates by the adverse party. We hold that paragraph 62A (1) does not apply to advocate/client bills of costs. An advocate whose instructions have been terminated is entitled to immediate payment of his fees for the services rendered. If upon demand the client refuses to pay, he is entitled to file his bill and have it taxed immediately. He does not have to wait until the matter is concluded. He also does not have to depend on the advocate on record to recover his fees for him. The client might compromise with his current advocate on his fees and no bill is filed.” [Emphasis added]

24. In the circumstances, this Court is satisfied that by relying on Paragraph 62 A of the *Advocates Remuneration Order* while dealing with the two bills before her, the Taxing Officer erred in law and principle and arrived at an erroneous decision. The discretion exercised to reach the outcome stated in her ruling, particularly the dismissal of the Bill dated 30th January 2023, calls for interference by this Court.



25. In regard to the submissions by the Respondent that there is no valid reference before this Court, a look at the letter dated 22nd September 2023 annexed to the Applicant's Supporting Affidavit shows it was in reference to the taxation of the Advocate/Client Bill of Costs dated 30th January 2023 and the ruling delivered on 19th September 2023.
26. The Applicant was dissatisfied and objected to the decision in its entirety for striking out its bill of costs on two grounds that is: -
1. The Applicant's Advocate/Client Bill of costs was treated as a party and party bill of costs and determined as such.
 2. The taxing master did not exercise its discretion judiciously.
27. The contents of that letter were sufficient as a notice and therefore, the issue by the Respondent that the Applicant did not specify the items objected to does not arise.
28. It is noted that the Applicant went ahead to ask for the ruling and reasons for taxation even though it is clear that the reasons for the ruling are stated in the ruling.
29. It does not make sense for a party to seek for reasons simply to appear to comply with Paragraph 11 (1) of the *Advocates (Remuneration) Order*. That has been the position held in several cases including *Evans Thiga Gaturu v Kenya Commercial Bank Limited* [2012] eKLR, cited by the Advocate herein where the Court had this to say: -

“In most cases the court is aware that the taxing officers in their decisions on taxation do deliver comprehensive ruling which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances, it would be foolhardy to expect the taxing officer to redraft another “ruling” containing reasons ...however, where there are reasons on the face of the decision, it would be futile to expect the taxing to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring the reference. Otherwise, mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for the reasons. ...” [Emphasis added]

30. Further, the Applicant was within the timelines for notifying the taxing master of his objection as provided for by the law. There is nothing to show that reasons were supplied yet rather than ignoring such request, there would have been no difficulty in the Taxing Officer simply indicating that the reasons are in the ruling. Be that as it may, and in the circumstances herein, this Court is satisfied that the letter dated 22nd September 2023 that sufficed as a Notice of Objection to the taxation and the reference herein is valid.
31. In conclusion, the Chamber Summons dated 28th September 2023 is meritorious and therefore the Court makes the following Orders: -
1. The ruling of the Deputy Registrar, Hon. N. Makau in the matter of Advocate- Client bill of costs dated 30th January 2023 between the Advocate and the client aforementioned be and is hereby set aside.
 2. The Advocate- Client bill of costs dated 30th January 2023 be and is hereby placed before any Taxing Officer for taxation.
 3. Due to the circumstances herein, each party is directed to bear his own costs.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF OCTOBER, 2024.

PATRICIA GICHOHI

JUDGE

**In the presence of:

Mr. Makori for Ms. Wamaitha Makori for the Applicant

Miss Muthoni for Mr. Mburu for the Respondent

Ruto, Court Assistant

