



**Mwangi Keng'ara & Co Advocates v Mungai (Miscellaneous Application E348 of 2021)
[2024] KEHC 14369 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E348 OF 2021**

**A MABEYA, J
NOVEMBER 20, 2024**

BETWEEN

MWANGI KENG'ARA & CO ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

RULING

1. This ruling determines the Client's Chamber Summons dated 22/11/2023. It is premised under rule 11(2) of the *Advocates (Remuneration) Order*. In it, the client seeks the setting aside of the ruling of the Taxing Master delivered on 1/11/2023 and the bill of costs dated 11/5/2021 to be remitted to another taxing master for fresh taxation.
2. The application was based on the grounds presented and the supporting affidavit sworn by Zipporah Mungai on 22/11/2023. In her affidavit, she stated that the taxing master made an error in principle and failed to exercise her discretion judicially in accordance with the law. That the taxing master erroneously overlooked the fact that the client had paid Kshs. 170,935/- towards the advocate's fees and failed to give appropriate credit for this payment despite the advocate's acknowledgment.
3. It was claimed that the taxing master excessively taxed the advocate/client bill of costs at Kshs. 491,241/78, while the advocate had only requested for Kshs 286,630.92. The client argued that the instruction fees, where no statement of defense had been filed, should have been reduced by 35%, resulting in a total of Kshs. 135,933/85. She maintained that upholding the taxing master's decision would result in an injustice to her and urged the Court set to aside the decision for a fresh taxation.
4. The application was opposed by the Advocate vide a replying affidavit sworn on 20/3/2023. The Advocate stated that the application did not establish an error of principle to warrant setting aside the assessment of the costs of Kshs. 491,241.78. That the advocate had filed a bill of costs where the total



costs amounted to Kshs 536,919/- and the taxing master taxed off Kshs 45,677.22 allowing a sum of Kshs. 491,241.78. That no error of principle had been established.

5. The primary issue is whether the applicant has established a valid case for setting aside the ruling of the taxing master. On 1/11/2023, the taxing master assessed the bill of costs dated 11/5/2021 at Kshs. 491,241.78. The client's reference challenges this assessment on the grounds of an error in principle. Specifically, the client contends that the taxing master failed to recognize the payment already made by the client and did not consider that, under Schedule 7, the instruction fees should have been reduced by 35%.
6. In *First American Bank of Kenya v Shah & others* [2002] 1 EA 64, Ringera J expressed himself as follows:

“I find that on authorities this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision on taxation was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle.”

7. The same principles were reiterated by the court of appeal in the case of *Joreth Ltd v Kigano & Associates* Civil Appeal No.66 of 1999 [2002] 1 EA 92,[2002] eKLR where it was held that, unless the taxing officer had misdirected himself on a matter of principle, the judge sitting on a reference against the assessment ought not to interfere with the findings.
8. Finally, in *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others* [2006] eKLR, the court held that: -

“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 authorizing 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...”

9. Having reviewed the impugned decision by the taxing master, I note that the bill was taxed in accordance with Schedule 7 of the *Advocates' Remuneration Order* 2014. It is well-established that the court will not interfere with the decision of the taxing master unless there is a clear error in the application of the principles of taxation.
10. On the failure by the taxing master to discount the sum of Kshs.170,935/- paid as deposit on fees, that cannot be taken to be an error of principle. That in my view amounts to an arithmetical error that can be cured by deducting the said sum from the awarded costs. I do not think that requires a re-taxation. Accordingly, I direct that the awarded costs of Kshs.491,241/78 be reduced by Kshs.170,935/- thereby making the award to be Kshs.320,306/78.
11. The fees did not have to be reduced by 35% since the defendant entered appearance and schedule 7 on party costs states that the fees charged on instruction fees will be 65% only where the other party had not entered appearance. I find no error in the taxing master's exercise of discretion, particularly in relation to the taxation of the instruction fee.
12. Accordingly, I find partial merit in the application. The awarded costs are adjusted to Kshs.320,306/78. Since the application was only partially successful, I will order each party to bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

