



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

J.R. MISC. APP. NO. 14 OF 2019

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16, LAWS OF KENYA AND THE
ADVOCATES REMUNERATION ORDER**

AND

IN THE MATTER OF THE ADVOCATES-CLIENT BILL OF COSTS

BETWEEN

ISHAMAEL & CO ASSOCIATES.....APPLICANT

VERSUS

BAJAJ ELECTRICALS LIMITED & WAYNE HOMES.....RESPONDENT

RULING

1. The applicant, a firm of Advocates seeks orders to set aside the Taxing Master's decision made on 21st May 2019 on item number 1 of the applicant's Advocate-Client Bill of Costs dated 15th February 2019. The applicant further prays that this court awards the instruction fees as drawn in the Advocate/ client Bill of Costs or as the court may deem fit. Lastly, the applicant prays for the costs of this application.
2. The application is premised on the grounds that the Taxing Master erred in principle by not awarding the instruction fees as claimed and that the Taxing Master erred in principle and in law by failing to consider that the proper instruction fees should have been based on the value of the subject matter which was the contract awarded to the Respondent.
3. Also, the applicant states that the Taxing Master gravely erred for ignoring and or failing to consider the written submissions on the instruction fees. The applicant also states that the Taxing Master erred for ignoring all the known principles of taxation by erroneously taxing off huge chunks in the instruction fees thereby arriving at an inordinately low figure of Ksh. 366,513/= as taxed costs. Lastly, the applicant states that the Taxing Master's misdirection's and errors complained of offend the known principles of taxation.
4. In the said Bill, the advocate claimed a total sum of Ksh. 40,322,629/=. Notably, the instruction fees claimed was Ksh. 23,137,500/=. but the Taxing Master awarded Ksh. 200,000/= increased by a half, i.e. 105,325/= plus VAT 16%, aggregating to Ksh. 366,531/=. My understanding is that the applicant is only challenging the instruction fees awarded only.

5. The applicant's counsel adopted the detailed submissions filed before the Taxing Master on 23rd April 2019 in which he emphasized the estimated value of the tender, the subject of the proceedings was US\$ 5,584,897.80 (Approximately Ksh. 558,432,131.20) and Ksh. 1,000,000,000/=. He argued that the value of the tenders awards were worth Ksh. 1,500,00,000,000/= and submitted that the instruction fees translates to Ksh. 23,576,481.

6. Before the Taxing Master, counsel cited *Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt a light Limited*,^[1] *Patmose Technical Services (K) Ltd v Rural Electrification Authority*^[2] and *Joreth Limited v K. Kiano and Associates*^[3] and urged the court to allow the said sum arguing that instruction fees are earned once instructions are issued by the client.

7. In the oral highlights before me, the applicant's counsel argued that a taxing master's decision can be disturbed if the Taxing Master fails to adhere to the rules in section 6A of the Advocates Remuneration Order, or if the Taxing Master does not appreciate the nature, importance or complexity of the matter. Counsel placed heavy emphasis on the value of the subject matter and argued that the amount taxed was too low to amount to injustice.

8. The Respondent's counsel argued that the matter was settled by consent in barely three months after it was filed in court, and, that, it did not proceed to hearing. He stated that the suit sought judicial review orders of *certiorari*, *mandamus* and *prohibition*. He referred to the principles set out in *Joreth Limited v K. Kiano and Associates*.^[4] Citing authorities, counsel argued that taxation of an advocates fees is meant to seek a reasonable compensation for the professional work done. He urged the court not to interfere unless it appears that the taxing master exceeded his jurisdiction. It was his submission that the Taxing Master fully explained how she arrived at the figures in question. He submitted that the amount awarded for instruction fees is reasonable.

9. The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court^[5] as follows:-

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

10. Differently put, before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.^[6]

11. It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision.^[7] This means that:-

“ . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.”^[8]

12. The Taxing Master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question raised by the applicant for reviewing/setting aside the taxation is therefore whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case.

13. The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision.^[9] The quantum of such costs is to be what was reasonable fees and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.

14. It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'^[10]

15. In principle, costs are awarded, having regard to such factors as:- (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles. Restating the principles of taxation of costs, the Ugandan Supreme court stated:-^[11]

"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 with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, *an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.*

Thirdly, *even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."*

16. Back at home, in *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others*^[12] 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 interference 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...”

17. The taxing master is also enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. The discretion vested in Taxing Master is to allow fees, costs, charges and expenses as appear to him to have been necessary or proper, and not those which may objectively attain such qualities, and that such opinion must relate to fees and all costs reasonably incurred, but, also imports a value judgment as to what is reasonable. The discretion to decide is given to the Taxing Master and not to this court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case.

18. 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, or failing to bring his/her mind to bear on the question in issue, or acting on a wrong principles. 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. The court must be of the view that the taxing master was clearly wrong i.e. its conviction on a review that he or she was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.

19. The principles governing taxation of costs were also reiterated in *Phemchand Raichand Ltd Another vs Quarry services of East Africa Ltd and Another*.^[13] They are: -

- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.*
- ii. The taxing master was expected to tax each bill on its merits;*
- iii. The value of the subject matter had to be taken into account;*
- iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;*
- v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.*
- vi. 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.[\[14\]](#)

20. The court observed that a mere production of a long list of authorities does not necessarily mean that there was protracted research by counsel and that an advocate should not be reimbursed for what he has not spent. The court will not normally interfere with the taxing master's ruling simply because it thinks it would have awarded a different figure had it been the one taxing the bill. The court can interfere if it is proved that the amount taxed was manifestly excessive or low, or if there is proof that the taxing officer followed a wrong principle in reaching his decision.

21. Applying the above considerations, the question is whether the Taxing Master erred or misapplied the said principles or improperly exercised her discretion. A reading of the Tax Masters ruling shows that she addressed the instruction fees in detail. She carefully listed down the factors to guide her discretion and heavily cited several decisions which laid down principles governing taxation and proceeded to observe that:-

“My analysis of the judicial review proceedings has not shown anything to have risen at all above the workday chores of legal practitioners. The responsibility entrusted to counsel was quite ordinary and called for nothing but normal diligence such as must attend the work of a professional in any field. There was nothing novel in the proceedings to justify any special allowance in costs. I have also not been able to see what, in the proceedings, could have been so greatly time-consuming, so research involving, so skill engaging to justify an enhanced award of instruction fees. This matter was filed on 5th February 2018 and concluded by way of consent on 13th June 2018. Looking at the court record and the proceedings in the judicial review application, it appears that the amount claimed by the applicant is excessive considering that this is a matter which did not proceed for hearing.

I have also reviewed several other references in respect of judicial review matters with a view of determining what the treatment in awards in such matters is and some of the cases are...

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

In public law litigation, the amount involved is not the sole determinant when it comes to costs. Judicial Review suits are not money suits as they merely seek declaratory reliefs and orders.

Taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein, I am of the considered view that Ksh. 200,000/- is reasonable instruction fees under the circumstances. (Ksh. 22,937,500/= is hereby taxed off).”

22. A reading of the Taxing Masters Ruling and in particular, the above paragraph shows clearly that the Taxing Master was not only alive to the law and principles governing taxation, but also, she took into account the said principles and fully understood the task before her. I am not persuaded that she misdirected herself or improperly exercised her discretion. This Court in the performance of its supervisory function, is entitled to and will interfere with the Taxing Master's rulings: 'If (a) he has not exercised his discretion judicially, that is if he has exercised it improperly; (b) he has not brought his mind to bear upon the question or (c) he has acted on a wrong principle.[\[15\]](#)Justice Maritz expressed this principle as follows:-

‘It should be borne in mind, however, that the review of the Taxing Master's decision on taxation is one going beyond the rather narrow common law parameters of judicial review applicable to the acts or omissions of public bodies. It is by its nature a review denoting 'a wider exercise of supervision and a greater scope of authority than those which the Court enjoyed' under either the review of the proceedings of lower courts or of public bodies acting irregularly, illegally or in disregard of important provisions of statute.’

23. The applicant's counsel argued that the Taxing Master gravely erred for ignoring and or failing to consider the written submissions on the instruction fees. This court has to determine, whether the Taxing Master properly addressed herself to law and the facts. However, it is trite law that this court will not interfere with or temper with the Taxing Masters decision unless it finds that the Taxing Master misdirected herself as regards her findings of facts or the law or applied the wrong principles of the law.

24. It is imperative for the Taxing Master to evaluate all the evidence and the submissions presented by the parties. A court cannot afford to be seen to be selective in determining what submissions to consider. However, some of the submissions might be found to be irrelevant or of little value. The best indication that a court has applied its mind in the proper manner to all the material presented before it is to be found in its reasons for judgment.

25. However, requiring the trial court to consider and weigh all the submissions is not meant that the judgment of the trial court must also include a complete embodiment of all the submissions made, as if it comprises a transcript of the proceedings. The duty of the High Court is to determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decision. In other words, in order to determine the merit of the applicants' contention, this court must consider their submissions in the lower court, and, juxtapose it against the decision, and finally determine whether there is any basis for interfering with the decision.

26. If this court finds that a particular fact or submission is so material that it should have been dealt with in the decision, but such fact or submission is completely absent from the decision or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether either the said misdirection, viewed on its own or cumulatively together with any other misdirection, is so material as to affect the decision, in the sense that it justifies interference by this court. In the circumstances of this case, there is nothing to show that the alleged failure to consider submissions (if any and I have found none) is so material that it amounts to a serious misdirection to warrant this court to interfere with the decision.

27. It is my conclusion that the Taxing Master did not apply the wrong principles in reaching her decision. It is also my finding that the Taxing Master properly exercised her discretion judicially, and she did not act on a wrong principles. She carefully took all the factors into account in arriving at the conclusion that the amount claimed as instruction fees was excessive in the circumstances.

28. In view of my findings herein above, I find that the application dated 3rd June 2019 is not merited. I dismiss the said application with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at **Nairobi** this 17th day of **January, 2020**

John M. Mativo

Judge

[1] Milimani HC Misc Cause No. 729 of 2006.

[2] {2018} e KLR.

[3] {2002} 1 EA 92.

[4] {2002} 1 EA 92.

[5] *In Visser vs Gubb* [1981 \(3\) SA 753](#)(C) 754H – 755C.

[6] See *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* [\[1984\] ZASCA 2; 1984 \(3\) SA 15](#)(A) and *Legal and General Insurance Society Ltd vs Lieberum NO and Another* [1968 \(1\) SA 473](#)(A) at 478G.

[7] *Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111.

[8] *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F C G.

See also the discussion by Botha J in *Noel Lancaster Sands (Pty.) Ltd. vs Theron and Others* 1975 (2) SA 280 (T) at 282D C 283D for a discussion of the nature and limits of the judicial function in this context.

[9] (See: *Ocean Commodities Inc vs Standard Bank of SA Ltd* [\[1984\] ZASCA 2; 1984 \(3\) SA 15](#) (A) at 18E-G).

[10] Per SMIT AJP in *Preller vs S Jordaan and Another* [1957 \(3\) SA 201](#)(O) at 203C - E.

[11] *Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC)*.

[12] **{2006} eKLR**).

[13] {1972} EA 162. Their lordships also cited with approval the decisions in the cases of *Attorney General vs Uganda blanket Manufacturers* CA No. 17 of 1993 (SCU); *Bashiri vs Vitafoam (u) Ltd* civil application No. 13 of 1995.

[14] See *Steel construction and Petroleum Engineering (EA) Ltd versus Uganda Sugar Factory Limited* [EA] 141; *Kabanda versus Kananura Melvin Consulting Engineers*, supreme court civil application No. 24 of 1993; *Makumbi and Another versus sole electrics (U) Ltd* [1990-1994] 1 EA 306 (SCU).

[15] *Kock vs SKF Laboratories (Pty) Ltd* 1962 (3) SA 764 (E) at 765E). See also *Preller v Jordaan and Another* 1957 (3) SA 201 (O) at 203C-E.