



Republic v Law Society of Kenya Disciplinary Tribunal; Kitulu (Exparte Applicant); Antony (Interested Party) (Judicial Review Miscellaneous Application 495 of 2017) [2019] KEHC 8478 (KLR) (Judicial Review) (3 April 2019) (Ruling)

Republic v Law Society of Kenya Disciplinary Tribunal; Jacinta Mutheu Antony (Interested Party) Ex parte Applicant Muema Kitulu [2019] eKLR

Neutral citation: [2019] KEHC 8478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 495 OF 2017
P NYAMWEYA, J
APRIL 3, 2019
IN THE MATTER OF THE ADVOCATES ACT
AND
THE MATTER OF THE ADVOCATES REMUNERATION ORDER**

BETWEEN

REPUBLIC APPLICANT

AND

LAW SOCIETY OF KENYA DISCIPLINARY TRIBUNAL RESPONDENT

AND

MUEMA KITULU EXPARTE APPLICANT

AND

JACINTA MUTHEU ANTONY INTERESTED PARTY

RULING

Background

1. The ruling herein is on two applications that arise from the taxation of a Party & Party Bill of Costs dated 25th July 2017, and on which a ruling delivered 28th June 2018 by Honourable L. A Mumassabba, who was the Taxing master. The Taxing master taxed the Bill of Costs as Kshs 219,920/=.



2. The events leading to the said taxation are as follows. Muema Kitulu, the ex parte Applicant herein, (herein after “the Applicant”) was not successful in a judicial review application filed herein, which was dismissed with costs to the Respondent and Interested Party in a judgment delivered by this Court on 12th July 2018. Jacinta Mutheu Anthony, the Interested Party herein, was the Applicant’s client and had filed a complaint with the Law Society of Kenya Disciplinary Tribunal, which is the Respondent herein, which gave rise to the judicial review application by the Applicant. Subsequent to this Court’s judgment, the Interested Party thereupon filed the Party and Party Bill of Costs that was the subject of the ruling delivered on the 28th November 2018.
3. The Interested Party has now filed the first application that is the subject of this ruling, which was brought by way of a Notice Motion dated 17th December 2018, seeking the following orders:
 1. That judgement be and is hereby entered against the Respondent for Kshs 219,920/= with interest at the rate of 14% p.a from 28th November 2018 till payment in full.
 2. That costs of the application be borne by the Respondent.
4. The application was supported by the grounds on its face and a supporting affidavit sworn by the Interested Party on the same date. It was the Interested Party’s case that the Applicant’s case was dismissed with costs, the certificate of taxation was issued in her favour and the Applicant has declined to satisfy the same. That there is therefore need for the taxed costs to be enforced through the application. Further, that there has been no application for stay or variation or setting aside has been filed, nor has any such order been made and it’s in the interest of justice that the application be allowed. The Interested Party annexed a copy of the Certificate of Taxation issued in her favour against the Applicant on 6th December 2018 for taxed costs of Kshs 219, 920/=-, and of a letter dated 11th December 2018 requesting settlement thereof, which was addressed to the Applicant’s Advocates.
5. The Interested Party’s application was opposed by the Applicant by way of Grounds of Opposition dated and filed on 19th February 2019 wherein it was stated that the application does not lie in law since there is no provision for the issuance of the orders sought under the Advocates Act and the Civil Procedure Act, as it concerns a Party and Party Bill Of Costs and not an Advocate Client Bill Of Costs. Further, that that there can only be one judgement in any matter or cause, and there already exists a judgement in this matter and the same having been delivered on 12/7/16
6. The Applicant in addition filed the second application the subject of this ruling, by way of a Chamber Summons dated 15th January 2019, in which he seeks the following orders:
 1. That this Court grants leave for extension of time for filling of this application
 2. That in the interest of the Overriding Objective principle, upon grant of prayer 1 above this application therefore be deemed to have been filed within time.
 3. That the decision of the taxing master in this matter in the party and party bill of costs between the applicant and the respondent made on the 28/11/18 be reviewed in terms of item number 1 of the said bill of costs as relates to instruction fees.
 4. That the costs of this application be provided for.
7. The application was supported by an affidavit sworn on 15th January 2019 by Antony Mudany, the Applicant’s advocate, and the grounds on its face. Basically the applicant is aggrieved by the ruling of the taxing master delivered on the 28th /11/2018. He attributed the attributed the delay in filing the application before court on not getting the typed ruling and reasons in time due to the Christmas



vacation and an on-going reorganisation of the files at the registry, and that it was not until 11th January 2019 that his advocates received communication from the counter that this file could be traced and that they should make a formal request for the ruling, which they did in a letter dated 9th January 2019, a copy of which was annexed.

8. The Applicant contends that the taxing master erroneously made a finding on item 1 that the fee applicable was Kshs 100,000/= instead of Kshs 45,000/=. Further, that the taxing master failed to justify or give reasons or explanation for the increase of instruction fees to Kshs 200,00/= despite making a positive finding that the proceedings entrusted on counsel were quite ordinary and nothing novel about them.
9. The application was opposed by the Interested Party by way of Grounds of Opposition dated 16th January 2019 as lacking merit, and being frivolous, vexatious and an abuse of the Court Process. Further, that the application is fatally incompetent and incurably defective, as the prayers sought therein do not lie in law since there is no provision for extension of time to file a Reference under the Advocates Act past the 14 days prescribed. In addition, that no reasonable excuse or justification has been adduced for the inordinate delay from 28th November, 2018 to date on why the applicant could not file a reference, and the reason for delay lacks seriousness since no request for such reasons was made within 14 days save for the purported letter dated 9th January, 2019.
10. That in any event, the ruling of the taxing master was already typed and availed to the parties at the time it was being read on 28th November 2018, and the court vacation commenced way after the 14 days had lapsed and cannot be a valid justification for extension of time. In any case the Registry is always open to receive letter even during court vacation. Lastly that the holding by the Taxing master on item 1 of Kshs 200,000/= was not excessive but reasonable.
11. The Court directed that the two applications by the Interested Party and Applicant be heard and determined together, and be canvassed by way of written submissions, which were duly filed by respective parties. Ongoya & Wambola Advocates, the counsel for the Applicant, filed submissions dated 19th February 2019, while Koceyo & Company Advocates who were the Interested Party's counsel, filed submissions dated 11th February 2019.

The Legal Arguments

12. The Applicant submitted that he has exhaustively explained the reasons for delay in the application, which is sufficient to justify the exercise of discretion for granting leave for the extension of time. Further, that the circumstance under which a judge interferes with the discretion of a taxing master should be based on the principles laid out in *First American Bank vs Shah and others* (2002) 1 EA 64, 19.. The Applicant further relied on the case of *Republic vs Ministry of Agriculture & 2 Others Ex-parte Muchiri W Njuguna & 6 Others* for the proposition that the court has the jurisdiction to interfere with the taxing master decision.
13. On the award of Kshs 200,000/= as instruction fees by the taxing master, the Applicant submitted that the taxing master is mandated to set out the basic fee before venturing to consider whether to increase or reduce it, and that there should be as far as practicable, be consistency in the awards made. In addition, that the taxing master is supposed to take into account the nature and the importance of the cause or matter, the interest of the parties, the general conduct of proceedings, any direction or finding by the trial judge or even any ruling relating to the matter.
14. Placing reliance on the Court of Appeal decision in *Joreth Limited vs Kigano & Associates*, [2002] 1 EA 92, the Applicant submitted that the value of the subject matter for the purposes of taxation of



a bill of costs ought to be determined from the pleadings, judgement or settlement. That if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

15. The Applicant urged that the Taxing master clearly made a determination that the applicable law is Schedule 6A1 (j) of the Advocates Remuneration Order 2014, and made a positive finding that this was not a complex matter and the responsibility entrusted to counsel was quite ordinary and called for nothing more but normal diligence such as must attend the work of a professional in any field. However, that the Taxing master applied the fees upheld in various authorities in her ruling without making any similarities between those decisions and this case, to warrant the capping of the fees to Kshs 200,000/=. Therefore, that the finding that the proceedings herein were ordinary necessitates the award of Kshs 45000/= which is in Schedule 6 (A) (1) j as instruction fees, and any enhancement of the figure must be supported by reason and justification. As such the amount awarded of Kshs 200,000/= as instruction fees is unreasonably high and should be reviewed down wards to Kshs 45,000/=.
16. Lastly, the Applicant submitted that having found there was an error of principle by the taxing master, the available remedy is the one that was clearly stated in Joreth Limited vs Kigano & Associates (*supra*) that if the judge comes to the conclusion that the taxing officer has erred in principle, he or she should refer the bill back for taxation by the same or another taxing officer, with appropriate directions on how it should be done.
17. The Interested Party on the other hand submitted that there exists a certificate of taxation which has not been set aside in her favour, and placed reliance on the determinations in M/s Lubulela and Associates Advocates vs N K Brothers Limited (2014) eKLR and Njeru & Co Advocates vs Zakhem Construction (K) Limited, HC Misc 486 and 487 of 2012 for the proposition that once a taxing master has taxed the costs and issued a certificate of costs, and there is no reference against it neither has it been altered and set aside no other action would be required from the court save to enter judgement. Further that an applicant is not required to file suit for the recovery of costs, as the certificate of costs is final as to the amounts of costs.
18. The Interested Party also cited the cases of Kithi & Co Advocates vs Menengai Downs Limited, HC 1039 of 2013, Muema Kitulu & Co. Advocates vs Obadiah Kuvivya(2011) eKLR, Owino Okeyo & Co Advocates vs Pelican Engineers & Construction Company Limited, (2007) eKLR, and Njonjo Okello & Associates v Ketan Lalit Chandra Doshi & Another, (2012) eKLR for the proposition that a certificate of costs cannot not be set aside through a replying affidavit or grounds of opposition. According to the Interested Party, the judicial process must come to an end and it's only proper for the taxed costs to be enforced. That the Applicant cannot therefore purport to open the case through the application for extension of time, or challenge the decision of the taxing master without filling a reference in time.
19. On the application for extension of time, the Interested Party submitted that no reasonable excuse or justification has been adduced for the inordinate delay as from 28th November 2018 to the date the Applicant filed his application, and reiterated their arguments as to why the reason given by the applicant lacked seriousness. In closing, the Interested Party submitted that the holding by the taxing master on instruction fees was not excessive but reasonable.

The Determination

20. There are two issues for determination raised by the pleadings and submissions made by the Applicant and Interested Party, , The first is whether the Applicant has laid out sufficient basis to warrant this



courts exercise its discretion by granting leave for extension of time for filling of this application. Secondly, if this discretion is exercised in favour of the Applicant, whether the award of Kshs 200,000/= as instruction fees by the taxing master is unjustified. Lastly, is whether judgment should enter in terms of the taxed costs of Kshs 219,920/= with interest.

21. The procedure for the challenge of a taxing master's decision is provided under Rule 11 of the [Advocates Remuneration Order](#) which provides as follows:

- “(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.
- (2) 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 concerned, setting out the grounds of his objection.”
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

22. The said provisions clearly grant the Court discretion to extend time for lodging a reference from the taxing master's decision on costs notwithstanding the expiry of the 14 day period prescribed. In exercising such discretion, the court acts judiciously bearing mind the facts placed before it and to meet the ends of justice, and the factors to be taken into account were enumerated in [Njagi Wanjeru & Company Advocates v Ben Momanyi t/a Momanyi & Associates](#), (2014) e KLR by Ougo J., who adopted the Court of Appeal's decision in [Leo Sila Mutiso v Rose Hellen Wangari Mwangi](#) CA Civil Application No. NAI 25 of 1997 (UR) that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

23. Turning to the Applicant's application herein, this Court takes judicial notice of the fact that there has been an on-going re-organization of its registry that may have affected access to the files therein, and this reason for the delay is thus reasonable and plausible. The delay by the Applicant in presenting its application is to this extent excusable, and in any event the period of delay from the date of the taxing



masters ruling on 28th November 2018 and the date of filing of the said application on 16th January 2019 is not inordinate, taking into account that the Court was on vacation for a part of the said period. Lastly, it is also in the interests of justice that the Applicant be allowed to exercise its statutory right to seek review of the decision of the Taxing master. I accordingly exercise discretion in favour of the Applicant and admit his application for reference from the taxing master's decision that was filed out of time.

24. The substantive issue in dispute in the reference filed by the Applicant is the taxation by the Taxing master of item 1 on instruction fees in the Interested Party's Party and Party Bill of Costs dated 27th July 2017. It is not disputed in this respect that the applicable law as regards taxation of Party and Party Bill of Costs is Schedule 6A of the *Advocates (Remuneration) Order* 2014, which provides for party and party costs of proceedings in the High Court. Paragraph 1(j) of the said Schedule provides as follows as regards instruction fees in 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—

- (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
- (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000
- (iii) to present or oppose application for setting aside arbitral award- 50,000.”

25. The applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in *First American Bank of Kenya Vs Shah and Others* [2002] E.A.L.R. 64 at 69 by Ringera J. (as he then was) who delivered himself thus;

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.

26. These principles reiterate the position of the Court of Appeal in *Joreth Ltd vs Kigano & Associates* (2002) 1 EA 92, where the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.



27. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in *Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others*, (2006) e KLR :

- “ 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;
5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”

28. These guidelines were also applied by Odunga J. in *Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd* [2014] eKLR, and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

29. I have perused the ruling by the Taxing Officer dated 28th November 2018, and note that she properly applied Schedule 6A of the *Advocates Remuneration Order*. She also noted that she has discretion to increase the amount taking into account factors such as the nature and importance of the cause or matter. The Taxing Officer also considered the principles as regards taxation of costs outlined in *Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others*, (*supra*) and other judicial decisions, as well as the trends of awards of instruction fees in comparable judicial review matters.

30. While taxing on the item on instruction fees, the taxing master in her ruling stated as follows:

“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.

I am fairly convinced that the basic fee applicable is governed by schedule 6A (J) (ii) of the *Advocates Remuneration Order*, 2014 and the fee provided is Kshs. 100,000/=. In the case



of *Republic –vs- Ministry of Agriculture & 2 Others Ex parte Samuel Muchiri W’Njuguna & 6 others* (2006)eKLR at page 19. It was held that:-

“Private Law claims do not fall in the same class as Public Law claims such as those in Judicial Review, in Constitutional Applications, in Public Electoral matters.

Such matters are in class of their own and the instruction fees allowable in respect of them should not, in principle be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations”

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. On question of increase on the aforesaid basic fee and this being a Party and Party Bill of Costs, I am of the view that Kshs 200,000/= is reasonable instruction fees taking into account the time taken in this matter, scope of the work done and the nature of the dispute herein. (Kshs 1,300,000/=) is hereby taxed off.”

31. It is my finding that that the taxing Officer did take into account relevant considerations, and took into account factors specifically provided for in Schedule 6A to increase instruction fees, and that she gave reasons why she exercised her discretion to tax off the item on professional fees from Kshs 1,500,000/= to Kshs 200,000/=. It is also notable that contrary to the Applicant’s submissions, the applicable basic instruction fee was not Kshs 45,000/= but Kshs 100,000/= as correctly found by the Taxing Master, as the judicial review proceedings herein were opposed and defended by the Interested Party. The instruction fee awarded by the Taxing Master was therefore not excessive in the circumstances.
32. I therefore find that the decision of the taxing master in awarding instruction fees of Kshs 200,000/= was not based on any error of principle, neither were the said cost as awarded excessive to justify interference by this Court.
33. The only outstanding issue is whether judgment can be entered on the taxed costs as sought by the Interested Party. It is an established position of law that the only reason that a court of law cannot enter judgment on a Certificate of Costs is if the same has been set aside or altered, or where there is an issue with retainer. Under section 51(2) of the *Advocates Act*, this Courts power to enter judgment in the Advocates’ favour on the taxed costs in such circumstances, and the said section provides as follows:

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”.
34. This position has been upheld in various cases including *Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Limited*, (2007) e KLR, *Dally and Figgis Advocates vs Homelex Limited* (2013) eKLR and *Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd* (2012) eKLR. It is again notable that contrary to the Applicant’s assertion, section 51(2) of the *Advocates Act* gives this Court the said powers in relation to Certificates of taxation any Bill of Costs, and does not distinguish between taxation of Party and Party Bills of Costs and of Advocate and Client Bills of Costs. In addition, Rule 7 of the *Advocates Remuneration Order* provides for interest on the said costs at 14 % until payment in full.



35. Since retainer was not disputed in this matter, and this Court has upheld the taxing Masters decision of 28th November 2018 on the taxed costs, there is no reason why judgment should not be entered as prayed by the Interested Party.
36. In the premises, I order as follows:
- I. Muema Kitulu, the *ex parte* Applicant herein, is granted leave to file a reference out of time from the ruling of the Taxing Master dated 28th November 2018, and his application by the Chamber Summons dated 15th January 2019 filed in this respect out of time is admitted to the court record.
 - II. The prayer in the Applicant's application by Chamber Summons dated 15th January 2019, that the decision of the Taxing master made on the 28th November 2018 be reviewed in terms of item number 1 of the Party and Party Bill of Costs as relates to instruction fees is denied.
 - III. Judgment is entered for Jacinta Mutheu Anthony, the Interested Party herein, against the *ex parte* Applicant for taxed costs of Kshs Kshs 219,920/=, as certified in the Certificate of Taxation issued 6th December 2018, and with interest thereon at 14% per annum from the date of taxation on 28th November 2018 until payment in full.
 - IV. The Interested Party shall have costs of the Applicant's Chamber Summons dated 15th January 2019, and of the Interested Party's Notice of Motion dated 17th December 2018 of Kshs 30,000/=.

37. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF APRIL 2019

P. NYAMWEYA

JUDGE

