



Bruce Odeny & Co Advocates v Sino Hydro Corporation (Environment and Land Miscellaneous Application E001 of 2023) [2025] KEELC 58 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEELC 58 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023
SO OKONG'O, J
JANUARY 20, 2025

BETWEEN

BRUCE ODENY & CO ADVOCATES APPLICANT

AND

SINO HYDRO CORPORATION RESPONDENT

RULING

1. Section 51(2) of the Advocates Act, Chapter 16 Laws of Kenya provides as follows:
 - (2) 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.
2. The Applicant is a firm of advocates. The Applicant filed an advocate and client bill of costs for taxation against the Respondent in respect of the services that the Applicant rendered to the Respondent in Kisumu ELC No. 90 of 2015(hereinafter referred to as “the primary suit”) where the Respondent was a defendant. The Applicant’s bill of costs was taxed by the taxing officer Hon. M.Shimenga on 14th March 2024 at Kshs. 8,881,612.50. The ruling on taxation was delivered in the presence of the Respondent’s advocate and was uploaded to the Judiciary Case Tracking System (CTS) on the same date of delivery. This means that the reasons for the ruling of the taxing officer were available to the parties on 14th March 2024. On 27th March 2024, 13 days from the date when the ruling on taxation was delivered and uploaded in the CTS, the Respondent’s advocates wrote to the Deputy Registrar objecting to the taxation of all the items in the Applicant’s Bill of Costs dated 14th January 2023 and asking to be provided with the reasons for the taxation under Paragraphs 11(1) and (2) of the Advocates Remuneration Order.
3. Paragraphs 11(1) and (2) of the Advocates Remuneration Order provide as follows:



- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he 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.
4. After filing the Notice of Objection as aforesaid, the Respondent did not file a reference under Paragraph 11 (2) of the Advocates Remuneration Order although the Respondent's advocates had the ruling by the taxing officer in their possession.
 5. What is before me is the Applicant's Notice of Motion application dated 11th April 2024 brought under Section 51(2) of the *Advocates Act* seeking an order that the Certificate of Taxation issued in favour of the Applicant on 26th March 2024 be converted into a decree and judgment be entered for the Applicant against the Respondent for the amount so certified together with interest from the date of taxation until payment in full. The application was supported by the affidavit of Agnes Akinyi Advocate in the Applicant's firm who stated that the Applicant's Advocate and Client Bill of Costs was taxed on 14th March 2024 in the sum of Kshs. 8,881,612.50 and a certificate of taxation was issued on 26th March 2024. She averred that the said certificate of taxation of costs had not been challenged or set aside.
 6. The Respondent opposed the application through an affidavit sworn by the Respondent's advocate, Ooko Steven filed on 20th September 2024. The Respondent admitted that the Applicant's bill of costs was taxed at Kshs. 8,881,612.50 on 14th March 2024. The Respondent averred that it was dissatisfied with the taxation and had instituted the process of challenging it through a reference. The Respondent averred that it had filed a Notice of Objection to taxation on 27th March 2024 and was waiting to be supplied with the reasons for the taxation to enable it to file the intended reference. The Respondent averred that while taxing the Applicant's bill of costs, the taxing officer relied on the earlier taxation of the party and party bill of costs that the court had set aside and was no longer valid.
 7. The application was heard by way of written submissions. The Applicant filed submissions dated 7th October 2024 while the Respondents filed undated submissions. I have considered the application together with the supporting affidavit. I have also considered the replying affidavit filed by the Respondent in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties and the various authorities cited in support thereof. Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya provides in clear terms that unless set aside or altered by the court, the certificate of taxation issued by the taxing officer is final as to the costs so certified. The Section gives the court the discretion to enter judgment for the sum certified by the taxing officer to be due where there is no dispute as to the retainer. This means that the judgment is not entered as of right. The court may refuse to enter judgment for good cause even without a dispute over the retainer. In the article, *The Discretion of the Judge*, Royal Bank of Scotland Lecture, Oxford University delivered on 17th May 1990, published in [1990] Denning Law Journal 27 it is stated that:

“...an issue falls within the discretion of the judge if, being governed by no rule of law, its resolution depends on the individual judge's assessment of what is fair and just to do in a particular case. He has no discretion in making his findings of fact. He has no discretion in his ruling on the law. But when, having made any necessary finding of fact and any ruling of law, he has to choose between different courses of action, orders, penalties or remedies



he then exercises a discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of a discretion.”

8. In *Patriotic Guards Ltd. v. James Kipchirchir Sambu* [2018] eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

9. In this case, the Respondent has contended that it was dissatisfied with the decision of the taxing officer and intends to challenge the same through a reference to this court. Under Section 51(2) of the *Advocates Act*, the mere fact that a party is dissatisfied with the decision of a taxing officer and intends to file a reference does not prevent the certificate of taxation from being final or bar the court from entering judgment for the amount certified. This in my view can only be a factor to be considered by the court while exercising its discretion whether to enter judgment for the sum certified or not.

10. As mentioned earlier, the decision of the taxing officer was made on 14th March 2024 and was uploaded on the CTS on the same date. In my view, the decision contained the reasons why the taxing officer taxed the Applicant’s bill of costs dated 14th January 2023 at Kshs. 8,881,612.50. The taxing officer relied entirely on the taxation of the party and party costs in Kisumu ELC No. 90 of 2015 in arriving at the said sum of Kshs. 8,881,612.50. This the Respondent has pointed out in its replying affidavit and submissions to be an error which the Respondent intends to take up in the intended reference where it would be challenging the entire ruling of the taxing officer. The Respondent filed a Notice of Objection to the taxation on 27th March 2024 in which it also requested for the reasons for the taxation under Paragraphs 11(1) and (2) of the Advocates Remuneration Order. As of 20th September 2024, almost 6 months after filing its Notice of Objection, the Respondent had not filed a reference. The excuse the Respondent has given in its submissions for this failure is that the taxing officer is yet to supply it with the reasons for the taxation. It is not clear to this court which reasons for the taxation the Respondent is waiting for. The Respondent has the ruling of the court that has the reasons in its possession. Even if it is assumed that the Respondent found the reasons insufficient and wanted more which were not forthcoming, that could not stop the Respondent from filing a reference. Failure by the taxing officer to furnish reasons for the taxation would be one of its grounds for challenging the taxation or asking for an extension of time to do so. I know that it is always a good practice for the taxing officer to inform objectors to taxation asking for reasons that the same is contained in the ruling which was not done in this case. This cannot however justify the Respondent’s indefinite wait for the said reasons if indeed it was desirous of filing a reference. I have noted from the record that apart from the Notice of Objection that was filed on 27th March 2024, the Respondent has not done any follow-up with the taxing officer regarding the reasons for the taxation that it is waiting for before filing a reference. I agree with the Applicant that there is indolence on the part of the Respondent. I also find the conduct of the Respondent unreasonable in the circumstances. While in appropriate cases the court may exercise its discretion in favour of postponing the entry of judgment under Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya pending the hearing of a reference against taxation, I am not persuaded for the reasons I have given that the Respondent herein deserves such indulgence. The Respondent is yet to file a reference. It is not known when it will do so. This court would be doing an injustice to the Applicant if it were to put the recovery of its fees on hold indefinitely.



11. In conclusion, I find merit in the Notice of Motion dated April 11, 2024. Judgment is entered for the Applicant against the Respondent in the sum of Kshs. 8,881,612.50 being the costs taxed and certified by the taxing officer to be due to the Applicant in her Certificate of Taxation dated March 14, 2024. The decretal sum shall be paid together with interest at court rates from the date hereof until payment in full.

DATED AND DELIVERED AT KISUMU ON THIS 20TH DAY OF JANUARY 2025.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Applicant

N/A for the Respondents

Ms. J. Omondi-Court Assistant

