

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLICATION NO. E014 OF 2023

ALOYSE WANGIRA & CO. ADVOCATES:.....APPLICANT

VERSUS

MBUKONI HOLDINGS LIMITED:.....1ST RESPONDENT/1ST CLIENT

THOMAS MAINGI WAMBUA:.....2ND RESPONDENT/2ND CLIENT

RUTH NZILA MAINGI:.....3RD RESPONDENT/3RD CLIENT

RULING

The application is dated 20th June 2024 and is brought under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules and Article 25 of the Constitution 2010 seeking the following orders;

- a) THAT pending hearing and determination of this application, this Honourable Court be pleased to admit this Application for prompt hearing being a post - judgment Application;
- b) THAT upon hearing this application, this Honourable Court be pleased to recalculate the instruction fee based on the findings on the subject matter;
- c) THAT the costs for the Application be in the cause.

It is based on the annexed affidavit of GERALD MUCHIRI and grounds that the Ruling on the instruction fees in the Advocates-Client Bill of Costs was predicated on the subject matter of Kshs. 100,000,000.00 which assessment was

not eventually tallied in the final award. That it is only fair and just that the said order is reviewed to arrest the error apparent as allowed by the Civil Procedure Rules. That this Application has been brought without undue delay upon noting the error apparent on the face of the record.

This court has considered the application and the submissions therein. 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 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.”

Be that as it may, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of *First American Bank of Kenya vs Shah and Others* (2002) EA 64 and *Joreth Ltd vs Kigano and Associates* (2002) 1 EA 92, that the Taxing Master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct

principles of law. In *First American Bank of Kenya vs Shah and Others* (2002) E.A.L.R 64 the court held that;

“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.”

These principles reiterate the position of the Court of Appeal in *Joreth Ltd vs Kigano & Associates* (2002) eKLR, 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.

The Applicant in the instant application contends that being dissatisfied with the Taxing Officer’s decision have filed this application. That the Taxing Officer erred in law and in fact in not taxing the Instructions Fees based on the value of the property which was Kshs. 100,000,000/= which was not disputed. That the correct one would be schedule 6(1)(a).

In *Republic vs Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna* (2006) eKLR Ojwang, J (as he then was) expressed himself 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 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 authorising clause in the law, or a particularised 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...”

In *First American Bank of Kenya vs Shah and Others* (2002) E.A.L.R 64 the court held that;

“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.”

In *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, it was held that:

“The principles applicable to a review of a taxing master’s decision

*The general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by the South African court in the case of *Visser vs Gubb* 1981 (3) SA 753 (C) 754H – 755C 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.”

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

*It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. (*Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111).*

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 review/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.

The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision. The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings 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.

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

Guidance can also be obtained from the Canadian case of Reese vs. Alberta {1993} 5 A.L.R. (3rd) 40in which McDonald J. sets out the general principles applicable to awarding costs, at page 44:-

"While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. ... The costs recoverable are those fees fixed for the steps in the proceeding by a schedule of feesplus reasonable disbursements...."

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 in Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC).stated:-

"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.”

*...The principles guiding the review of taxation in this court were settled in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*:*

“a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

b. A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.

c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.

d. An overall balance between the interests of the parties should be maintained.

e. The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.

f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling.”

The Applicant stated that they were instructed by the Respondent to represent them in a dispute over a fully developed residential area measuring five acres valued at over Kshs. 100,000,000/=. That the Taxing Master awarded the Applicant a sum of Kshs. 340,186.50/= which was manifestly low. That there was an error apparent on the face of the record.

The Taxing Master in her ruling dated 6th February 2024 provided that the taxation of the matter would be based on Remuneration (Amendment) order of

2014. Under Item one the taxing master based her calculations on schedule 6A. The taxing master contended that the subject matter was valued at Kshs. 100,000,000/= which was not disputed and so, the Advocate’s instruction fees would be assessed under Schedule 6A. She then proceeded to tax item 1 at Kshs. 123,236/= and stated this was per scale.

Schedule 6 provides that;

“To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and—

<i>That value exceeds</i>	<i>But does not exceed</i>	
<i>Kshs</i>	<i>Kshs.</i>	<i>Kshs.</i>
	<i>500,000</i>	<i>45,000</i>
<i>500,000</i>	<i>750,000</i>	<i>65,000</i>
<i>750,000</i>	<i>1,000,000</i>	<i>75,000</i>
<i>1,000,000</i>	<i>20,000,000 fees as for Kshs.</i>	
<i>1,000,000 plus an additional 1.75%</i>		
<i>Over 20,000,000</i>	<i>fees as for 20,000,000 plus an additional 1.5%.</i>	

(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

<i>That value exceeds</i>	<i>But does not exceed</i>	
<i>Kshs.</i>	<i>Kshs.</i>	<i>Kshs.</i>
	500,000	75,000
500,000	750,000	90,000
750,000	1,000,000	120,000
1,000,000	<i>20,000,000 fees as for Kshs.1,000,000</i>	

plus an additional 2%.

Over 20,000,000 Fees as for 20,000,000 plus an additional 1.5%.

(c) To defend proceedings where the defendant substantially adopts the defence of another defendant; an instruction fee calculated under subparagraph 1(a).

(d) To defend any other proceedings; an instruction fee calculated under subparagraph”

The Advocate Remuneration Order is a remuneration code which stipulates how an Advocate is to be remunerated once the Advocate is retained to render professional services. It contains a costing of the services ordinarily rendered by advocates. Because it is a code which specifies what a particular service would cost, it has been split into various schedules, each schedule containing the costing of a particular category of services. The First Part of Schedule 1 relates to services rendered by an advocate in relation to sales and purchases of land. The Second Part of Schedule 1 relates to services rendered by an advocate in relation to debentures, mortgages and charges. The third part of Schedule 1 relates to services rendered by an advocate in relation to negotiation of sale of property by private treaty or loan secured by mortgage.

It is not disputed that this bill of costs arises out of a dispute over a fully developed residential area measuring five acres original land parcel No. 12715/261 at Syokimau within Mavoko Municipality valued at over Kshs. 100,000,000/=. I find that the applicable scale is indeed found in Schedule 6 of the Advocates Remuneration Order 2014. The Taxing Master did err taxing the instruction fees at Kshs. 50,000/=.

The Taxing Master in her ruling dated 21st August 2024 provided that the taxation of the matter would be based on Remuneration (Amendment) order of 2014. Under Item one the taxing master based her calculations on schedule 6 of the 2014 Advocates Remuneration order and taxed it at Kshs 340,186.50/=. She considered that the value of the subject matter was Kshs. 100,000,000/=. She awarded the instruction fees at Kshs. 50,000/= despite finding that the subject matter was Kshs. 100,000,000/=. I find an error in principle and in the circumstances the fees awarded are not correct. I find that there is an error by the Taxing Master in the assessment. Consequently, I find that the application is merited and make the following orders;

1. That the Ruling of the Taxing Officer delivered on 6th February, 2024 in the Machakos Misc. Application No. 014 of 2023 and the Certificate of Taxation arising thereon be set aside/vacated.
2. That the bill of costs is to be taxed by a different Taxing Master.
3. There will be no order as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY
OF NOVEMBER 2025.**

N.A. MATHEKA

JUDGE

ORIGINAL