



C.M. Thuku & Company v Kimani (Environment and Land Miscellaneous Application E216 of 2022) [2024] KEELC 433 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 433 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E216 OF 2022
EK WABWOTO, J
JANUARY 31, 2024

BETWEEN

C.M. THUKU & COMPANY ADVOCATE

AND

ANNAH WANJIRU KIMANI CLIENT

(Being a reference from the Ruling on taxation of Advocate's Bill of costs by the Taxing Officer, Honourable Isabella Barasa (D.R.) dated and delivered on 7th February 2023)

RULING

1. The Client/Applicant filed a Reference vide a Chamber Summons application dated 3rd April 2023 which was accompanied by a supporting affidavit sworn by Annah Wanjiru Kimani where the Applicant sought the following orders:
 - a. That the Honourable Court be pleased to vacate and set aside in its entirety the Ruling and reasoning of the Taxing Master, Honourable Isabella Barasa (DR) dated and delivered on 7th February 2023 taxing the Advocate/Respondent's Bill of costs dated 7th October 2022 at Kshs 975,000/=
 - b. That the Honourable Court be pleased to re-assess Item No. 1 the quantum of total fees and Value added Tax chargeable in the Advocate/Respondent's bill of costs.
 - c. That in the alternative to prayer 2 above, the Honourable Court be pleased to remit the Bill of costs dated 7th October 2022 for re-assessment of Item No 1, the quantum of total fees and Value Added Tax chargeable before the taxing master or a different taxing master with appropriate directions.
 - d. That the costs of this Application be provided for.



2. The Application was premised on various grounds including that:
 - i. That the Taxing Master acted contrary to well settled principles of law and also misdirected herself on principles of law applicable.
 - ii. In respect to Item No. 1. the Taxing Master failed to find that the Respondent was not wholly entitled and had already been paid by the Applicant.
 - iii. The Taxing Masters arrived at the decision in an unclear unreasonable manner when the value of the subject matter was not ascertainable.
 - iv. The Taxing Master had only been asked to tax instructions but she proceeded to award other figures which had not been prayed for.
3. The Respondent filed grounds of objection and a Replying Affidavit both dated 12th April 2023 which was premised on three main grounds. Firstly, that the reference was time barred, secondly that the reference being filed on the same taxation file was procedurally improper and lastly that the Applicant had not demonstrated that the decision of the Taxing Master was based on an error of principle.
4. The Client/Applicant filed submissions dated 16th October 2023 in which it was submitted that filing the Reference followed the procedures laid out in Rule 11 of the Advocates Remuneration Order. It was submitted that after delivery of the ruling a Notice of Objection was filed on 17th February 2023 but did not receive reasons for the ruling until 31st March 2023. Relying on the case of Pyramid Motors Limited v Langata Gardens Limited [2015] eKLR it was argued that the Taxing master was obligated to give reasons for taxation. It was also submitted that the value of the property at the time of filing the suit was Kshs. 460,000/- and that this is an issue that should have been considered at the time of taxation.
5. The Respondent also filed extensive submissions dated 17th October 2023 citing twenty-four authorities which the court has considered. The Respondent argued that the Applicant had not met the evidentiary threshold set out in Section 107,108,109 and 112 of the *Evidence Act*.
6. Having considered the parties' submissions and responses, it is clear that the issues for determination before this court are as follows:
 - i. Whether the reference is time barred and filed without leave of the court?
 - ii. Whether the Taxing Officer erred in law and principle while taxing the Advocate - Client Bill of Costs herein and thereby reached a wrong assessment?
7. The procedure by an aggrieved party to challenge a taxation ruling is set out in the Advocates Remuneration Order Paragraph 11 and is very specific on what an aggrieved party should do. A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling.
8. Paragraph 11 of the Advocates Remuneration Order stipulates-
 - “ 11(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 14 days from the receipt of the reasons apply to the judge in chambers which shall be served on all 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 sub paragraph (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 enlarge the time fixed by subparagraph (1) or subparagraph (2) of the taking of any step.
 - 5) Applications for such an order may be made by chamber summons upon giving every other interested party not less than 3 clear days' notice in writing or as the court may direct, and may so made notwithstanding that the time sought to be enlarged may have already expired.”
9. It is important to emphasize that the Taxing Master would often indicate that the reasons are contained in the decision. An obligatory duty is enforced upon the Taxing Master on receipt of the notice of objection. Secondly, the use of “may” connotes available options for relief and not necessarily a step by step procedure that is cast in stone. It is therefore apparent from the law that in addition to option of filing a notice of objection, the filing of a reference within 14 days from the date of receiving the reasons for the decision is also an alternative available option.
10. In this instance, it is undisputed that the Notice of objection was filed in good time. The Advocate/ Respondent argued that the reference was filed forty one days (41) days late. Rule 11(2) clearly outlines that the reference may be filed fourteen (14) days after receiving the reasons and not after filing the Notice of Objection. For this reason, I disagree with the position of the Respondent and find that the reference was filed in good time and duly placed before the court
11. With regards to Issue no 2, it is common ground that a reference is an appeal against the decision of the taxing officer, therefore the issue of Taxing Officer’s jurisdiction is of paramount importance. This Court is guided by the decision of the Court of Appeal in Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited NRB CA Civil Appeal No. 154 of 2014 [2017] eKLR where it was held as follows:-

“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the *Advocates Act* and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in *Taparn vs Roitei* [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The *Advocates Act* and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill...”[Emphasis Mine]



12. The principles governing taxation of costs by a Taxing master laid out in the above cited cases were also reiterated in the leading case of Premchand Raichand Ltd Another vs. Quarry services of East Africa Ltd and Another (1972) eKLR. The principles laid out 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
13. I echo the sentiments of Ojwang J(as he was then) in Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna [2006] eKLR, where he expressed that:
- “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...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... The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity ...” [Emphasis Mine]
14. In this instance, I have perused the said taxation ruling and deduce that sufficient and reasonable reasons were provided by the 'Taxing Officer' as follows;
- “...The bill of costs shall be taxed pursuant to Schedule 6 of the ARO 2014...Though the current value of the suit property is not ascertainable from the pleadings on the court record that value has appreciated over time from 1994. The consideration paid for the suit property in 1994 cannot be the basis for assessing the instruction fees. I have also considered the interests of the parties evident in the pleadings, documents and proceedings on the court record and the care and labour employed by counsel in the prosecution of the suit.”
15. In view of the foregoing, this Court dispels the Applicant's argument that the Taxing Officer erred in her determination. With regards to the issue of costs, Section 27 of the [Civil Procedure Act](#) outlines the Court's discretion to award costs. Ultimately, it is in the interest of justice for litigation to come to an end therefore I am not inclined to award any costs herein.



16. In conclusion, this Court hereby finds that the Client/Applicant's Chamber Summons Application dated 3rd April 2023 is unmerited and the same is hereby dismissed in its entirety with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Thuku for the Advocate/Respondent.

Ms. Waweru for the Client/Applicant.

Court Assistant; Caroline Nafuna.

