



M/S Oyugi Ombui & Co. Advocates v Abuti (Environment and Land Miscellaneous Application E013 of 2023) [2024] KEELC 210 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 210 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2023
MC OUNDO, J
JANUARY 25, 2024

BETWEEN

M/S OYUGI OMBUI & CO. ADVOCATES APPLICANT

AND

JULIUS OSANGA ABUTI RESPONDENT

(Reference arising from the decision of the Taxing Officer, Honourable F.M. Nyakundi, Deputy Registrar, dated and delivered on the 3rd of March, 2023 in Kericho ELC, Misc, Application Number E018 of 2022)

RULING

1. Before me for determination is an Application dated 29th March 2023 by way of Chamber Summons brought pursuant to the provisions of Section 3A, 89 and 94 of the Civil Procedure Act, Cap 21; Rules (11(1)(2) and 11(4) of the Advocates Remuneration (Amendment) Order, 2014 in which the Applicant herein seeks for the following orders:
 - i. That the decision of the Taxing Officer to award Kshs. 154,000/= as total costs of the Advocate Client Bill of Costs dated 26th of October 2022 be set aside.
 - ii. That the Taxing Master's Ruling and Reasons for taxation delivered on the 3rd of March, 2023 ("Taxation Ruling") be reviewed with respect to the sums allowed and the sums taxed off.
 - iii. That in the alternative, the Taxing Master's Ruling and reasons for taxation delivered on the 3rd of March, 2023 be set aside and the Advocate Client Bill of Costs dated 26th of October, 2022 be remitted for taxation afresh.
 - iv. That costs of the application be provided for.



2. The Applicant's application was supported by the grounds therein and the Supporting Affidavit of even date sworn by Advocate Edmond Kiprono, who deponed that on 4th August, 2021, the Respondent instructed the Applicant herein to defend him in Kericho ELC Suit No. E016 of 2021 and later on 16th February, 2022, the Respondent similarly appointed the said Applicant to represent him in Kericho Misc. Application No. E001 of 2022 as evidenced by a Copy of Instruction note and Notice of Appointment of Advocates annexed and marked as "EK-1" and "EK-2" respectively. That both ELC. Suit No. E016 of 2021 and Kericho ELC, Misc. Application No. E001 of 2022 were heard and determined in favour of the Respondent herein through the representation of the Applicant.
3. That at the time of giving instructions, the Respondent agreed to pay Kshs. 410,000/= in Kericho ELC Suit No. E016 of 2022 and Kshs 400,000/= in Kericho Misc. Application No. E001 of 2022. That when the aforementioned matters were concluded in favour of the Respondent, the said Respondent further instructed the Applicant to prepare a Party and Party Bill of Costs. That upon conclusion of the said suits, the Applicant demanded for payment of Advocates fees but the Respondent ignored the demands thus culminating to the filing of an Advocate's Client Bill of Costs vide Applicant's Misc. Civil Application No. E18 of 2022 wherein a ruling had been delivered on 3rd March, 2023. The Applicant was awarded a sum of Kshs. 155,000/=. That the Applicant is yet to receive a copy of the ruling despite several follow ups as evidenced by email correspondences annexed and marked as "EK-5"
4. That notwithstanding, the Applicant subsequently filed a notice of objection to the decision on taxation on 16th March, 2023 pursuant to the provisions of paragraph 11 of the Advocates Remuneration Order 2014 where he deponed that the Taxing Master had not given reasons and/or justification for awarding Kshs. 154,000/= in relation to representation of the Respondent in Kericho ELC No. E016 of 2021 and Kericho ELC No. E001 of 2022 -High Court Environment and Land Division (sic). That the said award was contrary to the well-established principles of taxation of the Advocate Client Bill of Costs in addition to being against what the Respondent had agreed to pay the Applicant at the time of instruction. That the foregoing notwithstanding, on 9th March 2023, the Respondent forwarded KCB Banker's cheque No. 601564 of Kshs. 122,605/= stating that the same was full and final settlement as evidenced from his forwarding letter annexed and marked as "EK-7"
5. The Applicant's instant Reference therefore sought the court's interference with the decision of the Taxing Master dated 3rd March, 2023 and the award of Kshs. 154,000/= as costs in favour of the Applicant.
6. The Application was opposed by the Respondent's Replying Affidavit dated 18th September, 2023 on the grounds that it was an afterthought, the Respondent having paid all the Advocate Client taxed bill of cost and the Applicant having acknowledged receipt of the same. Further that the Applicant was still on record for the Respondent in the matters referred to in their proposed bill as both matters were still pending execution and the Respondent had not taken up the same or instructed another Advocate. That the Applicant had therefore not concluded providing his services in the two matters.
7. That the Taxing Master was entitled to use his/her discretion to assess instruction fee as he/she considered just, considering the nature and the importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances.
8. He acknowledged that the Applicant herein represented him in the instant suit to its finalization where upon the same was taxed at Party to Party costs of Kshs. 292,450/= all inclusive. The said amount was pending execution to date. That notwithstanding, that he had already paid the Applicant a sum of Kshs. 154,000/= which amount was as a result of the taxation of the Advocate-Client Bill of Costs.



9. That in the Party and Party Bill of Costs, the Applicant never raised the cost of Kshs. 1,165,626/= he was now raising which amount was exorbitant, punitive and unjustified. That the Applicant was only determined to unjustly enrich himself since the opposed bill of costs awarded to him was very fair and pursuant to the *Advocate's Remuneration Order*.
10. He deponed that the Applicant had resorted to introduce new evidence in the Instruction Note (annexed as "EK-1) at the appeal stage without leave of the court, despite the said evidence being at his disposal during taxation. That the new evidence ought to be struck out more so since there had been a strange inclusion of the handwritten word "deposit" to the said document which was inadmissible.
11. That the Taxing Master was right to tax off all the items listed in the supporting affidavit. That the Applicant did not demonstrate how he had arrived at the instruction fees demanded herein. Further that Kericho ELC Misc. Application No. 001 of 2022 was withdrawn with costs but the Applicant had not taxed the same and therefore could not turn around to reap exorbitantly from the Respondent. The Respondent sought that the Reference be dismissed with costs and the earlier impugned Bill be upheld to put the instant matter to rest permanently.
12. The application was disposed of by way of written submissions to which I shall proceed to summarize as follows;

Applicant's submissions.

13. The Applicant summarized the factual background of the matter before framing one issue for determination to wit; whether the decision and Ruling of the Taxing Master should be set aside and remitted for taxation afresh.
14. The Applicant's submissions while placing reliance on the provisions of Paragraph 51 of the *Advocates Remuneration Order* was that the applicable scale to be used in the subordinate court in the matter of taxation of an Advocate-Client Bill of Costs was Schedule VII. He further relied on the decision in the case of *Vipil Prechand Haria v Kilonzo & Co. Advocates* [2020] eKLR to submit that in the instant matter, the Taxing Master departed from the established principles of law in arriving at his decision as he did not give reasons on how he had arrived at the said decision of awarding Kshs. 154,000/= to the Applicant. Further, that there was no justification for the Taxing Master to award such sums as such total costs had contravened what the parties had earlier agreed in their signed instruction dated 4th August, 2022, being a deposit of Kshs. 410,000/= as instruction fee which agreement had been duly highlighted and supplied to the Taxing Master prior to the Taxation decision.
15. That it was trite law that an Advocate and his Client were entitled to enter into an agreement in respect of the fees payable in so far as the said fees charged was not below what the *Advocate Remuneration Order* provided for, which the Taxing Master seems to have either overlooked or totally disregarded. That the Taxing Master in the circumstances, failed to apply the Advocate Remuneration Order in determining the instruction to be paid to the advocate as he neither took into consideration the nature of the proceedings that took place nor consider that the Respondent had been awarded costs of Kshs. 377,250/= in Misc. Application No. E001 of 2022 and Kshs. 292,450/= in ELC Suit No. 16 of 2021.
16. That consequently, the Taxing Master ought to have taxed the Bill pursuant to Schedule 6 Paragraphs B sub paragraph (a) or (b) of the *Advocates (Remuneration) (Amended) Order, 2014*. The applicant urged the court to consider the Reference as merited and allow the same as prayed.



Respondent's submissions.

17. In opposition to the Applicant's application, the Respondent in his submissions reiterated that the Applicant had represented him in a full trial, where he had been awarded his costs of Kshs. 154, 000/= . That after receiving the sum of money on 9th February 2023 and consuming the same, he had moved the court on 30th March 2023 demanding for replenishment of the ran out account in the name of a Reference where he had indirectly tried to introduce items that had been taxed accordingly. That he had in fact not attended the hearings save for the two that had been listed by the Taxing Master.
18. That the Taxing Master had even pitied the Applicant when he awarded him an additional Kshs. 120,000/= despite the fact that he had not conducted the instant matter to full trial. That instruction fee was a static value the parties had agreed on before the outcome of the suit and therefore it should not be the practice of parties to renege on agreements when the high value had come to light (sic).
19. That the Taxing Master was entitled to use his discretion to assess such instruction fees as he considered just, considering, amongst other matters, the nature and the 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 and that it was not really in the province of a judge to re-tax the bill. Reliance was placed on the decision in the case of *Joreth Limited vs. Kigano & Associates* [2002] 1 EA 92 at 99).
20. The Respondent submitted that the Applicant had not shown any principle that had been disregarded by the Taxing Master since in awarding the impugned amount, the taxing officer had provided the reason as to why discretion was exercised in the manner it had been. That subsequently, it was misleading for the Applicant to allege that he was still on record at the conclusion of the matter when a Notice of Change of Advocate had duly been filed. The taxing officer could not be faulted for matters that the Applicant was aware of and did nothing about.
21. Reliance was placed on the decided case of *Paul Ssemogerere & Olum vs Attorney General-Civil Application No. 5 of 2001* (unreported) to submit that the taxing officer had complied with the basic fee principle as he had first set out the basic figure before increasing the amount as required by the *Advocate Remuneration Order*. Further that no reason or leave had been proffered by the Applicant as to why the introduced document should be admitted now since it had not been produced before the Taxing Master. That consequently, the said document should be expunged from the record since the Applicant was all along aware of the said document and the same could only be admitted pursuant to leave having been granted.
22. In conclusion, the Respondent reiterated that the discretion of the taxing officer had been exercised judicially hence the instant Reference was just an afterthought with the intention of unjust enrichment. He thus prayed that the same be dismissed with costs to the Respondent.

Determination

23. I have considered the Application, the response in opposition, the submissions, as well as the Authorities herein cited by the parties. The Applicant, for reasons herein above stated, seeks to set aside the decision of the Taxing Master in the Advocate Client Bill of Costs dated 26th of October 2022 so that the same can be taxed afresh. The application was opposed on the basis of the above captioned grounds and thus I find the issue arising for determination as being:-
 - i. Whether the Taxing Officer had committed any errors of principle while taxing the bill of costs.
24. Rule 11 of the *Advocates Remuneration Order* provides 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.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (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) 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.
25. Pursuant to the provisions of Paragraph 11 of the *Advocates Remuneration*, I note that being aggrieved by the decision of the taxing master in his ruling dated 3rd March 2023, the Applicant objected to the same vide his Notice of Objection dated 15th March 2023 and was therefore within the prescribed period of fourteen days.
26. Pursuant to the Applicant's Notice of Objection, it is not clear whether there had been a response by the Taxing Master on the reasons for his decision on the items the objector had raised or whether in his decision, the Taxing master had given his reasons for his decision on the item therein objected to and therefore there would have been no need to seek further reasons or to give notice in writing to the Taxing Master for the said decisions. I say this because the Applicant did not annex the impugned Taxing Master's decision to his application to enable the court make a determination on whether (s)he had committed any errors of principle while taxing the Bill of Costs.
27. The often cited case of *First American Bank of Kenya vs. Shah & Others* [2002] 1 EA 64 sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Master's exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in *Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another* [1972] E.A 162 and *Arthur vs Nyeri Electricity Undertaking* [1961] E.A 492. The said principles were also re-affirmed by the Court of Appeal in *Joreth Limited vs Kigano and Associates* [2002] 1 E.A 92. These principles include
- i. that the Court cannot interfere with the Taxing Master's discretion 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;
 - ii. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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;
 - iii. if the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master for reassessment unless the judge is



satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

iv. it is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”

28. From the above stated, it can be discerned that there is thus a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low so as to lead to an injustice, see *Premchand's case* (supra)

29. Based on the above captioned principles, I find that there has been no basis disclosed upon which this court can interfere with the Taxing Master's discretion on taxation on the impugned bill of costs. The application herein dated the 29th March 2023 is incompetent and the same is struck out with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 25TH DAY OF JANUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

