



**Machakos County Government v Kabaka t/a Kabaka and Associates Advocates (Environment and Land Miscellaneous Application 66 of 2019) [2024] KEELC 151 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 151 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 66 OF 2019**  
**A NYUKURI, J**  
**JANUARY 24, 2024**

**BETWEEN**

**MACHAKOS COUNTY GOVERNMENT ..... APPLICANT**

**AND**

**BONIFACE MUTINDA KABAKA T/A KABAKA AND ASSOCIATES  
ADVOCATES ..... RESPONDENT**

**RULING**

**Introduction**

1. Before court is a chamber summons dated 22<sup>nd</sup> November 2019, filed by the client/applicant seeking the following orders;
  - a. That the decision of the taxing officer dated 6<sup>th</sup> November 2019 in Machakos ELC Misc. Appl. No. 387 of 2017, Boniface Mutinda Kabaka t/a Kabaka and Associates Advocates v. Machakos County Government on the taxation of the respondent's advocate - client bill of costs on instruction fees therein dated 24<sup>th</sup> October 2017 and filed on the same date and any consequential order(s)/certificate(s) arising thereon be set aside/vacated.
  - b. That the bill of costs be taxed afresh by a different constituted taxing officer.
2. The summons is premised on the grounds on its face and the supporting affidavit sworn by James Kathili Advocate on 22<sup>nd</sup> November 2019. The applicant's case is that in assessing the advocate-client bill of costs dated 24<sup>th</sup> October 2017, and awarding a sum of Kshs. 71,984,824.025 to the advocate as instruction fees, the taxing officer erred in principle and arrived at a decision contrary to the applicable law.
3. They further faulted the decision of the taxing officer on grounds that, the taxing officer failed to find that the final determination of the suit was not in monetary value of Kshs. 4,818,988,535/- but



450 acres; that the taxing officer failed to give reasons on how she valued 450 acres to be worth Kshs. 4,181,988,535/-, which was the basis for taxation on instruction fees; that she failed to consider relevant factors of the case including the nature of the final settlement; that the awarded instruction fees was manifestly high and unreasonable amounting to oppression and injustice; and that the taxation did not properly consider the principles and formula provided in schedule 6 of the Advocates (Remuneration) Order 2014. They attached the bill of costs and the respondent's affidavit; the taxing officer's ruling; letters dated 6<sup>th</sup> November 2019 and 12<sup>th</sup> November 2019; applicant's submissions filed before the taxing officer and affidavit.

4. The application is opposed. Boniface Mutinda, the respondent filed a replying affidavit sworn on 18<sup>th</sup> December 2019. It was the respondent's case that the taxing officer correctly assessed his bill of costs in accordance with the relevant provisions of the Advocates Remuneration Order.
5. The respondent stated that the instruction fees awarded by the taxing officer was based on the pleaded amount in the plaint which was the sum of Kshs. 4,818,98,535/- being outstanding rates owed to the applicant. That the applicant filed Machakos ELC Case No. 40 of 2015 through the respondent advocate seeking payment of rates in the sum of Kshs. 4,818,988,535/-. He stated that if interest were to be included in the claim he would be entitled to more money than what was taxed.
6. He denied allegations made by the applicant that there was settlement recorded in Machakos ELC No. 40 of 2015 as the applicant through their Chief Land Officer one Mwikali Muthoka swore an affidavit dated 16<sup>th</sup> April 2018 denying the settlement deed produced by the respondent on the basis that it was undated, incomplete and not signed by parties. He stated that in fact on 20<sup>th</sup> November 2018, the said Mwikali Muthoka testified on oath that the settlement deed was merely a proposal for the applicant to receive 450 acres in lieu of the rates due to the applicant, but that the negotiations never bore fruit and that the applicant never settled with the defendant in the primary suit.
7. The respondent maintained that the applicant was bound by their pleadings where the value of the subject matter was disclosed and there was no negotiations sanctioned by the court. He emphasized that there was therefore no final award for the taxing officer to have relied on and that even if the settlement had been filed, the value of 450 acres would certainly have been Kshs. 8,450,492,607/- as that was the monetary value of the land rates Kapiti Plains Limited owed the applicant and the 450 acres were being exchanged in lieu of payment as equivalent to the money. He asserted that his claim for instruction fees was derived from the plaint where a sum of Kshs. 4,818,988,535/- was pleaded as outstanding rates owed to the applicant. He attached the affidavit of Mwikali Muthoka dated 16<sup>th</sup> April 2018, in support of his averments.
8. The application was canvassed by way of written submissions. On record are the applicant's submissions filed on 21<sup>st</sup> July 2023 and the respondent's submissions dated on 28<sup>th</sup> September 2023.

### **Applicant's submissions**

9. Counsel for the applicant submitted that it was not controverted that the applicant filed Machakos ELC No. 40 of 2015 (Machakos County Government v. Kapiti Plains Estate) for recovery of Kshs. 4,818,988,335/- but that however that matter did not proceed to hearing as the parties settled the same vide a deed of settlement in 2016 as acknowledged in the affidavit of the respondent dated 14<sup>th</sup> February 2018 filed in Machakos ELC Miscellaneous Application No. 387 of 2017.
10. Counsel relied on the provisions of schedule 6 of the Advocates Remuneration Order 2014 and the case of Peter Muthoka & Another v. Ochieng & 3 Others [2019] eKLR for the proposition that the taxing officer ought to use discretion in assessing instruction fees by considering the nature and importance



of the matter, interest of the parties, the general conduct of the proceedings and the direction by the trial judge.

11. It was submitted for the applicant that in view of the deed of settlement, the claim of Kshs. 4,818,988,335/- was to be abandoned and what was to be adopted was the transfer of 450 acres. Counsel therefore argued that in basing her assessment of instruction fees on the claimed sum of Kshs. 4,818,988,335/-, the taxing officer proceeded on wrong principles and that she would have been guided by the applicant's submissions dated 7<sup>th</sup> August 2019 in Machakos ELC Misc. Application No. 383 of 2017. Counsel argued that where there is a settlement, pleadings should not be considered. Further reliance was placed on the case of *DK Law Advocates v. Zhong Gang Building Material Co. Ltd & Another* [2021] eKLR which the court has duly considered.

### **Respondent's submissions**

12. Counsel for the respondent submitted that the taxing officer did not err in applying Schedule 6 (b) of the Advocates Remuneration Order 2014 in determining instruction fees. Counsel argued that there was no settlement of ELC Case No. 40 of 2015; otherwise if there were such settlement, the applicant would have filed a deed of settlement in court. Further that in any event, the applicant's Chief Officer, Lands denied under oath the existence of a settlement. Counsel argued that the applicant should not be allowed to change their narrative on the issue of settlement.
13. Counsel relied on the case of *Premchand Raichand Limited & Another v. Quarry Services of East Africa Ltd & Another* [1972] EA, for the proposition that a superior court should not interfere with the exercise of discretion of the taxing officer unless it is shown that the award is too high or too low as to amount to an injustice.
14. The court was further referred to the cases of *Joreth Limited v. Kigano & Associates* [2002] 1 EA 92, *Mohansons Food Distributors Ltd & Another v. Kenya Commercial Bank Limited & Another* [2021] eKLR and *Otieno, Ragot & Company Advocates v. Kenya Airports Authority* [2021] eKLR for the proposition that instruction fees can be ascertained from pleadings or settlement where the value of the subject matter is disclosed; and if that value cannot be ascertained, the taxing officer ought to apply his or her discretion judiciously. Counsel argued that this court can interfere with the exercise of discretion of a taxing officer where it is demonstrated that the same was exercised capriciously or in abuse of the principles of law.

### **Analysis and determination**

15. I have carefully considered the chamber summons, the response thereto and the rival submissions filed by the parties. I have also called for, perused and considered pleadings and the record in Machakos ELC No. 40 of 2015 (*Machakos County Government v. Kapiti Plains Ltd and Misc. Application No. 387 of 2017*). In my view, the sole issue for determination before this court is whether the taxing officer properly exercised her discretion in assessing the instruction fees in her ruling of 6<sup>th</sup> November 2019.
16. Taxation of costs is not a mathematical exercise. It is a discretionary function of the taxing officer and therefore this court will not ordinarily interfere with the exercise of that discretion merely because one of the parties thinks that the award is too high or too low; unless it is clearly demonstrated that the taxation was premised on an error of principle or the amount awarded was manifestly too low or too excessive to amount to an injustice and to justify a conclusion that the taxation was based on an error of principle.



17. In the case of *First American Bank of Kenya v. Shah & Others* [2002] 1EA, 64, the court held as follows;

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 interference 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.

.....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.

18. Similarly, in the case of *Premchand Raichand Limited & Another v. Quarry Services of East Africa Limited & Another* [1972] EA, the court held 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, and 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.

19. Under Schedule 6 of the Advocates Remuneration Order 2014, the value of the subject matter may be determined from the pleadings, judgment or settlement between the parties. The same schedule 6 provides that in the exercise of discretion, the taxing officer ought to take into consideration namely, the nature and importance of the matter; the interest of the parties; the general conduct of the proceedings; directions by the trial judge; and all other relevant circumstances.

20. It is therefore trite that in assessing instruction fees, the taxation ought to be based on the value of the subject matter which may be ascertained from pleadings, judgment or settlement by the parties. However, where the value of the subject matter cannot be ascertained, the taxing officer applies their discretion by taking into consideration relevant matters which include; the value and importance of the matter; the interest of parties; general conduct of the proceedings; the care and labour applied by the advocate; and the judge's direction in the matter.

21. As the value of the subject matter may be ascertained from the pleadings, judgment or settlement, it follows that the stage at which the proceedings have reached at the time of filing the bill of costs, will inform the basis for determining the value of subject matter. Therefore if a matter has been heard and there is a judgment; or if there is a settlement by the parties, such judgment or settlement as the case may be, will form the basis for ascertaining the value of the subject matter, and hence pleadings in such proceedings will be of no relevance for that purpose. I am fortified with the reasoning in the case of *Peter Muthoka & Another v. Ochieng & 3 Others* [2019] eKLR, where the Court of Appeal held as follows;

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form of basis for determining subject



value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be heard to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

22. In the instant matter, the dispute turns on whether or not there was a settlement in Machakos ELC Case No. 40 of 2015 as at the time of filing the advocate-client bill of costs. This in my view, is a straight forward matter, although parties have filed several affidavits to demonstrate admissions and denial of a settlement. While the applicant/client insists that there was a settlement as the parties in the primary suit agreed that 450 acres be granted to the client (Machakos County Government) by the defendant Kapiti Plains Estate Ltd, and that the fact was admitted by the advocate in his affidavit of 14<sup>th</sup> February 2018, the advocate/respondent states that there was no settlement as denied in the affidavit of the applicant's chief officer lands, one Mwikali Muthoka.
23. I do not think, that the issue of whether or not there was a settlement in Machakos ELC No. 40 of 2015 can be resolved by allegations and counter allegations contained in affidavits of the parties. Section 107 of the *Evidence Act* provides that whoever makes an allegation must prove it. The existence of a fact is not proved by mere affidavits and allegations that such fact exists. Where there is contestation, like in the instant matter, the person alleging existence of a fact bears the burden of proving that fact. Therefore, instead of relying on affidavits of his opponent to impute admission, the applicant who alleges that there was a settlement had quite a simple task to do; namely, to avail the deed of settlement before this court. Since they have not filed any deed of settlement arrived at or filed in Machakos ELC No. 40 of 2015, the other contestations and alleged admissions are non issues and immaterial. In the absence of a settlement and a judgment, in this matter, the only recourse in ascertaining the value of the subject matter would be the pleadings.
24. Having considered the pleadings in Machakos ELC No. 40 of 2015, it is clear with no shadow of doubt, that the plaintiff in that suit, who are the applicants herein, pleaded in paragraph 4 of their plaint that the defendant therein owed them rates in the sum of Kshs. 4,818,988,535.00. That is the sum they demanded and prayed for in their suit.
25. From the taxing officer's decision, it is clear that she derived the value of the subject matter from the pleadings. In view of the provisions of Schedule 6 of the Advocates Remuneration Order, it is my finding that the taxing officer properly exercised her discretion in ascertaining the value of the subject matter from the pleadings, and therefore there is no basis or justification to interfere with her discretion in assessing instruction fees as at the time of taxation, there was no judgment or settlement and the pleadings clearly disclosed the value of the subject matter.
26. In the premises, I find and hold that the chamber summons dated 22<sup>nd</sup> November 2019 is devoid of merit and the same is hereby dismissed with costs to the respondent.
27. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

Ms. Kyama for respondent



Ms. Mutuku holding brief for Mr. Munyao for applicant  
Josephine - Court Assistant

