



**BM Mung'ata & Company Advocates v Makiti (Environment and Land Miscellaneous Application E013 of 2022) [2024] KEELC 1109 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1109 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2022  
LG KIMANI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**BM MUNG'ATA & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**WILLIAM MULWA MAKITI ..... RESPONDENT**

**RULING**

1. The Applicant's Advocate – Client Bill of Costs dated 14<sup>th</sup> September 2022 arose from legal services rendered to the Respondent in Kitui Judicial Review No. E1 of 2021 Republic vs The Deputy County Commissioner, Kitui West Sub-County and 3 others ex parte William Mulwa Makiti. The said bill of costs was on 8<sup>th</sup> March 2023 taxed at Kshs 223,335.00. Being dissatisfied with the taxing officer's decision, the Applicant filed the Chamber Summons dated 22<sup>nd</sup> March 2023 seeking the following orders:
  1. That the decision of the taxing officer dated 8<sup>th</sup> March 2023 on the taxation of the applicant's Bill of Costs dated 14<sup>th</sup> September 2022 and filed on 11<sup>th</sup> November 2022 and any consequential orders thereon be set aside and/or vacated.
  2. That the Advocate-Client bill of costs dated 11/11/2022 be taxed afresh by a different constituted taxing officer in strict compliance with the Advocates Remuneration Order and the applicable principles of taxation fairness and equity as guided by this court.
  3. That in the alternative, this Honourable Court be pleased to assess/tax the costs lawfully payable to the Applicant vide the said Bill of costs dated 11/11/2022 on Item 1 being the Instruction fees, Item 2 being the getting up fees, the service fees and the Value Added Tax(VAT) payable thereon.
  4. That leave do issue to the Applicant herein to annex a copy of the ruling and reasons therein after a copy is obtained from the court.



5. That this Honourable court be pleased to order that costs of this application as well as costs in the contested bill of costs be borne by the respondent.
  6. That this Honourable Court be pleased to make such order and/or orders as it may deem just and appropriate in the circumstances.
2. In support of the application, the Applicant states that the learned taxing officer erred in principle and arrived at a decision that was contrary to the applicable law. She misapprehended and misapplied the law under Schedule 6 of the Advocates (Remuneration) Order 2014 in assessing instructions fees at Kshs 150,000/= which amount was inordinately low without giving any reasons for the decision. It was further stated that the taxing Officer erred in failing to award getting up fees
  3. In her supporting affidavit, Anne M. Munyao Advocate on behalf of the Applicant law firm deposed that despite representing the Respondent in Kitui Judicial Review No. E1 of 2021 Republic vs The Deputy County Commissioner, Kitui West Sub-county and 3 others until judgment, the client failed, ignored and/or refused to settle their legal fees, prompting them to file an Advocate/Client Bill of Costs.
  4. They contend that the taxing officer taxed the Advocate-Client Bill of Costs at a total sum of Kshs.186,870, with 150,000 being the instruction fees, failing to award fees for getting up or for preparing for trial and failed to award VAT as well or raise the total amount by 50%.
  5. She also has been unable to secure a typed copy of the ruling despite requesting a copy of the same and repeated follow-ups.
  6. The Advocate deposed that the taxing officer's decision to tax the instruction fees at Ksh.150,000 in the Applicant's Bill of Costs has no basis in law or facts and cannot be justified.

### **The Respondent's Preliminary Objection**

7. The Respondent filed a preliminary objection on the points that:
  1. The decision of the taxing officer dated 8<sup>th</sup> March 2022 was done professionally in pursuit of the Advocates' remuneration order applying all principles of taxation, fairness and equity.
  2. The Applicant's law firm is changing to a new lawyer who did not represent the Respondent in court to hide material truth, raise and file misleading statements in court to extort, deprive and defraud money from services already paid for in advance.
  3. The ruling on court taxation of 8<sup>th</sup> March 2023 didn't provide a provision for appeal and hence the application costs shall be borne by the applicant alone.
  4. The Respondent and his lawyer had agreed on a total sum of Ksh. 300,000 and are bound by the said agreement.
  5. Under *the Constitution* of Kenya on right to access to information, every person has a right to correction or deletion of untrue or misleading information that affects the person and stated that the court shall use its jurisdiction to order and direct any concealed issue or matter be brought before the court to ensure fairness and justice.
8. The Respondent also filed a replying affidavit sworn on 11<sup>th</sup> May 2023 deposing that the Applicant withdrew from representing him when he was served with an application dated 16<sup>th</sup> May 2023 and hence the Applicant did not represent him until the full trial. He also stated that he had to represent



- himself and appoint another lawyer to represent him. He further stated that the Advocate who swore the affidavit in support of the application did not represent him and was not familiar with this matter.
9. The Respondent stated that they had agreed on legal fees in the sum of Kshs. 300,000 and the taxed bill was fair.
  10. Counsel for the Respondent urged the court to reject the reference citing conspiracy to defraud the Respondent unlawfully.

### **The Applicant's submissions**

11. The Applicant submitted that the law on costs is provided for under Section 27 of the *Civil Procedure Act* CAP 21 and the same are in the discretion of the Court. Counsel submitted that the taxing Officer made a fundamental error by taxing the instructions fees at Kshs 150,000/= stating that the fees greatly undervalued the work that they have done and should have been set at Ksh. 1,000,000 and referred to the judicial review case of Republic vs Capital Markets Authority ex parte Solomon Muyeka Alubala; National Bank of Kenya Limited (Interested Party) (2021) eKLR as well as the case of Joreth Limited v Kigano & Associates (2002) E.A 92
12. The Applicant submits that in awarding the basic instruction fees, the court should take into account various factors such as the amount of work involved, the significance of the case and the resources expended and states that the 150,000 undermines the substantial efforts, extensive research and dedicated time invested in effectively defending the client's interests.
13. On whether getting up fees should be awarded the Applicant submits that the taxing officer acted in an illogical and erroneous manner by unjustly disallowing the getting up fees and terms it a breach of due process and fairness while relying on the case of Kiambu Murutani Co. Ltd v Kamindi Selfridges Supermarket (2021) e KLR.
14. On Value Added Tax(VAT), the Applicant submits that the omission was a failure to appropriately consider and apply the relevant principles since it is firmly established that legal fees are subject to taxation. It was further submitted that it was illogical and absurd to require proof of payment for taxation on funds that have not yet been received and relied on the holding in the cases of Pyramid Motors Limited v Langata Gardens Limited (2015) eKLR and Mereka & Co. Advocates v New Kenya Co-operative Creameries Limited (2018) eKLR.
15. In addition to this, the Applicant submits that it was unjust to tax off the service fees when the Advocates are based in Machakos and the case was heard and determined in Kitui. Further, since there were multiple responding parties involved, the burden of serving all the parties was significantly increased.
16. The Applicant concluded that in a reference like this one, the exercise of the court's discretion will be that the judge will not normally interfere with the exercise of the discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs as was held in the case of Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB (2005) eKLR submitting that a review of the decision of the taxing master is warranted in this case.

### **The Respondent's submissions**

17. The Respondent raised an issue with the Bill of costs arising from a file where he states he was not a party, being Judicial Review Case No. E1 of 2020 which according to him is a principal error and hence he cannot be held responsible for the advocate-client bill of costs arising from that matter.



18. The Respondent invited the court to take judicial notice of the fact that since the taxation bill has arisen from Judicial Review E1 of 2020 which the respondent was not a party to, the Applicant has made a false allegation and that the reference should be struck off with costs to him.

### **Analysis and Determination**

19. The Applicant challenges the Deputy Registrar's ruling delivered on 8<sup>th</sup> March 2023, arising from the Applicant's Advocate – Client Bill of Costs dated 14<sup>th</sup> September 2022.
20. The Respondent raised a preliminary objection dated 11<sup>th</sup> May 2023. The objection raises various issues; He stated that the taxing Officer followed principles of taxation, that the Applicant withdrew from acting for him in the course of proceedings and he had to represent himself and instruct another Advocate. He also stated that there existed an agreement on payment of fees and a down payment had already been paid. It is trite law that a valid preliminary objection must be on a pure point of law. The case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, is the locus classicus on preliminary objections. On what constitutes a Preliminary Objection, it was held as follows; -

“ A preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”
21. A plain look at the Respondent's Preliminary objection shows that the points raised are not pure points of law but contain facts which have to be ascertained from the record, contrary to the precedent set out above in the case of Mukisa Biscuit Manufacturing Co. Ltd (supra). The court's view is that the facts stated in the preliminary objection cannot be presumed to be correct and indeed some of the facts as gleaned from the court record are incorrect. The objection cannot therefore stand.
22. On the substantive application, Section 13 of the Advocates (Remuneration) Order provides for taxation of cost as between advocate and client on the application of either party and states;

“The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event, the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.”
23. The Respondent in his submission claims that the primary suit subject of the Advocate-Client bill of costs did not involve him and he was not a party to the suit. It is noted that this objection was not raised before the taxing officer for determination. The documents attached to the Bill of Costs relate to Machakos Judicial Review case No. E1 of 2020 Republic Vs. The Deputy County Commissioner Kitui West Sub-County & others Ex parte William Mulwa Makiti. It is common knowledge that the said suit was transferred to this court and became Kitui Judicial Review Case No. 2 of 2021 between the same parties.
24. The Respondent's contention that the case brought through the bill of costs filed by the Applicant did not involve him is untrue. Indeed, the Respondent in his replying affidavit and other documents filed before the Deputy Registrar and before this court admits having been represented by the Applicant in the primary suit and for the most part he states that there was an agreement between him and the Advocate to pay fees in the sum of Kshs. 300,000/=.



25. The Applicant challenged the taxing Officer's decision on the Instruction fees awarded contending that he was awarded an inordinately low amount. In the Advocate-Client Bill of Costs dated 14<sup>th</sup> September 2022, the Applicant had set the instruction fees at Ksh. 1,000,000. The same was taxed at Ksh. 150,000, relying on the Court of Appeal Case Joreth Limited v Kigano & Associates [2002] eKLR.
26. The Court notes that taxation of instruction fees concerning judicial review matters is guided by Schedule 6 (A) (1) (j) of the Advocates (Remuneration) Order 2014 which states that;
- (j) Constitutional petitions and prerogative orders  
To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—
- (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
- (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000
- (iii) to present or oppose application for setting aside arbitral award 50,000
27. The foregoing provision provides for a minimum instructions fee of Kshs. 100,000/= . The court notes that taxation is at the discretion of the taxing officer but such discretion must take into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate. The Court has perused the documents filed in Machakos Judicial Review application E1 of 2020 (later Kitui Judicial Review Case No. 2 of 2021), the Chamber summons dated 5<sup>th</sup> October 2020, Statement of Facts, verifying affidavit, Notice of Motion application dated 8<sup>th</sup> October 2020 and written submissions. The Applicant states that the award made by the taxing officer did not take into consideration the amount of work involved, the significance of the case the resources expended and the decision to only increase the amount by Kshs. 50,000/= undermines substantial work, extensive research and time invested in representing their client's interests.
28. However, upon looking at the taxing Officer's ruling, it is noted that the taxing Officer took all these factors stated by the Applicant into consideration and justified the award of Kshs 150,000/= on consideration of the subject matter of the suit, complexity of the case and the interests of the parties. The decision on the amount to award was at the discretion of the taxing officer. The suit subject matter of the litigation sought orders of judicial review by way of certiorari, prohibition and mandamus over land that had been the subject of land adjudication. The applicant has not explained to the court the stated complexity and significance of the case. The documents filed are not bulky and the Applicant has not shown that the amount of work involved in drafting pleadings would go beyond the instructions fees recommended under the Schedule cited above. I find that the taxing master made no error in the exercise of her discretion and neither were the fees awarded manifestly low to warrant interference. I find no reason to interfere with the said discretion and the consequent finding.



29. The Court is guided by the decisions of the Court in the case of Republic v Capital Markets Authority Ex Parte Solomon Muyeka Alubala; National Bank of Kenya Limited (Interested Party) [2021] eKLR where Nyamweya J quoted the holding of Ojwang J as follows:

“Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (2006) eKLR :

- “1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of the advocate’s instruction fees;
5. objectivity is to be sought when applying loose-textures criteria in the taxation of costs;
6. where the complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”

30. The Court has also followed the case of Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others Ojwang, J (as he then was) expressed himself inter alia 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 interference that it was based on an error of principle.”



31. The Applicant sought getting up fees of Kshs. 500,000/= and the Taxing Officer taxed off the entire amount relying on the case of National Bank of Kenya v Rachuonyo & Rachuonyo Advocates [2021] eKLR where it was held that:

“on getting up fees, the relevant provision for appeals in the High Court, and by deduction appeals before the Court of Appeal, would be paragraph 3 and not paragraph 2 of schedule 6. Paragraph 3 reads:-

32. The court went on to state that:

“Eligibility for getting up fees is dependent on certification by the Court entertaining the Appeal, at the conclusion of the hearing, that in view of the extent and difficulty of the work after the lodging of the appeal, the case is a proper one for consideration of getting up fees. In the matter before Court, the Advocates ceased acting before the appeal was heard and there could not have been opportunity for the certification contemplated by the provisions of paragraph 3. On my part, I would not award getting up fees and the Court takes the view that the objection in this regard should succeed.”

33. However, I note that the National Bank (supra) case cited by the taxing officer was an appeal while the present case was not an appeal but a Judicial Review proceeding. It is further noted that the Advocates taxing the bill of costs ceased acting for the client before the appeal proceeded for hearing. It is thus this Court's finding that the said case can be distinguished from the facts of this case.

34. Fees for getting up for trial are provided for under Schedule 6 (2) of the Advocates (Remuneration) Order 2014 which states that;

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation: Provided that—

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
- (ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
- (iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”

35. The Court has noted from the documents filed before the taxing officer that a denial of liability was filed by the Interested Party and the matter went to trial by way of written submissions. There is nowhere under Schedule 6 (2) that states that where taxation of costs relating to judicial review matters the court has to certify the award of a fee for getting up for trial.

36. In the case of Republic v Capital Markets Authority Ex Parte Solomon Muyeka Alubala; National Bank of Kenya Limited (Interested Party) (Supra): Nyamweya, J held with regard to taxation of getting up fees paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014.



Paragraph 2 of Schedule 6A of the Advocates (Remuneration) Order 2014, provides as follows:

“Paragraph 2 only requires denial of liability in a case, for getting up fees to payable. In addition, a close reading of the paragraph shows that the matter need not proceed to a full hearing, and it is sufficient that it is ready for and has been confirmed for hearing. In this respect the Taxing Officer correctly noted, and it is not disputed by the parties that the present application was contested and proceeded to a full hearing. It is also on record that the parties filed submissions and attended Court on various dates for the hearing, which items were not contested by the Respondent.”

37. Similarly, it was held by Nambuye J in the case of Republic V Senate Students Disciplinary Committee Kenyatta University & Another [2008] eKLR that:

“As for the current applicant's assertion that getting up fees is not payable in the circumstance of this case, the court makes an observation that no authority, that it is only main hearing which are prepared. This court takes judicial notice of the fact that judicial review is a special jurisdiction. Parties access it through pleadings titled affidavit and statements which the original applicant prepared. Defence to the same is by way of a replying affidavit. It cannot be termed to have been nonexistent because the defence was brought on board and intimated by conduct that they were willing to defend and when given an opportunity to file their defence, they failed to do so. Despite failure to put in a reply as a defence, they showed interest that they were willing to participate in the arguments and when given an opportunity to file skeleton arguments, they failed to do so and then entered a consent. .... . The court is therefore satisfied that as per provisions applicable to judicial review, pleadings were duly filed by the originator and these were defended in the manner specified above. Irrespective of failure to file papers, the rules allow the current applicant to defend on points of law which option they availed themselves of. Getting up fee is therefore payable in the circumstances of this case and was rightly awarded.”

38. The court finds that the decision of the taxing Officer in failing to award getting up fees was erroneous in principle and the same is hereby awarded being 1/3 of the instructions fees.

39. As the Applicant rightly put it, it was held by the Court of Appeal in the case of Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR that:

In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said on page 492 paragraph I:

“Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases.”

40. Regarding an award of VAT, the Applicant submitted that it is common knowledge that legal fees are subject to the said tax. The Applicant stated that the taxing officer taxed off the amount claimed for VAT citing lack of proof of payment stating that the said reasoning is inherently flawed since under the [Value Added Tax Act](#), Cap 476, Laws of Kenya Section 9(3) provides for it.

41. However, contrary to the submission by the Applicant the taxing officer in her ruling awarded VAT at the rate of 16% in the sum of Kshs 34,945 while relying on the authority of Pyramid Motors Ltd Vs Langata Gardens Limited (2015) e KLR.



42. The Applicant further challenged the taxing Officer's decision to tax off some amounts related to service fees. Fees payable for service of documents are provided for under Schedule 6 (9) which states that;

Service

- a. within three kilometres of the High Court or district registry of the High Court Kshs 1,400.
- b. Every additional kilometre over three, such amount as is reasonable, not exceeding per kilometre Kshs 35
- c. For travelling and subsistence expenses incurred by the process server; charge the actual expense incurred.
- d. Where service is by post or by any other mode of substituted service, charge the actual expenses incurred

43. The Court has perused the bill of costs and noted that the items set out as service do not indicate the distance between the places from where the documents to be served were obtained and where they were served as required under Schedule 6 (9) (a) and (b). The bill and the documents do not show travelling and subsistence costs incurred by the process server. The above-mentioned rules require taxation on service fees to be based on distances and actual expenses and in the court's view the claim for service fees was unsupported and this court finds that the taxing officer was not wrong in taxing off the said amounts.

44. The Applicant further challenged the Taxing Officer's failure to add to the amount taxed 50% as per Schedule 6 (B) of the Advocates (Remuneration) Order 2014. The Court has considered the taxing officer's ruling and noted that it is indeed true the amount taxed was not increased. Schedule 6 (B) states as hereunder;

“As between advocate and client the minimum fee shall be—

- (a) the fees prescribed in A above, increased by 50%; or
- (b) the fees ordered by the court, increased by 50%; or
- (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.”

45. From the foregoing provision of the law the Court is of the view that the taxing Officer was wrong in principle when she failed to consider the provisions of the said Schedule 6 (B) and failed to increase taxed fees awarded under Schedule 6 (A) (1) (j) by 50%. The Court thus finds that under instructions allowable on an Advocate and client bill of costs.

46. Based on the above the court finds as follows;

1. That the decision of the taxing officer dated 8<sup>th</sup> March 2023 on the taxation of the applicant's Bill of Costs dated 14<sup>th</sup> September 2022 be and is hereby set aside and/or varied to a limited extent.
2. The Applicant's bill of costs dated 8<sup>th</sup> March 2023 is hereby taxed as follows;
  - a. Item 1- Instructions fees taxed ..... 150,000.00



|    |   |            |
|----|---|------------|
| b. | Item 2- Getting up fee for trial .....                                | 50,000.00  |
| c. | All other items are to remain as taxed<br>by the Taxing Officer ..... | 68,410.00  |
| d. | Sub-Total .....   | 268,410.00 |
| e. | Add 50% (Schedule 6 (B)) 268,410 X 50%.....                           | 134,205.00 |
| f. | Add VAT 16% X 402,615 .....   | 64,418.40  |
| g. | Less amount paid .....  | 30,000.00  |
|    | GRAND TOTAL.....  | 437,033.40 |

**DELIVERED, DATED AND SIGNED AT KITUI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HON. L. G. KIMANI**

**JUDGE ENVIRONMENT AND LAND COURT**

The ruling is read virtually and in open court in the presence of-

J. Musyoki Court Assistant

M/s Mutuku holding brief for Munyao for Applicant

No attendance by Respondent

