



Anti-Counterfeit Agency v Sherman Nyongesa & Mutubia Advocates (Environment and Land Miscellaneous Application E046 of 2022) [2024] KEELC 1016 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E046 OF 2022
NA MATHEKA, J
FEBRUARY 28, 2024**

BETWEEN

ANTI-COUNTERFEIT AGENCY APPLICANT

AND

SHERMAN NYONGESA & MUTUBIA ADVOCATES RESPONDENT

RULING

1. The application is dated 26th April 2023 and is brought pursuant to Paragraph 11(2) of the [*Advocates Remuneration*, 2009](#) seeking the following orders that;
 1. The Ruling and Taxation made on the 12th April 2023 herein be reviewed and overturned in their entirety.
 2. The Bill of Costs dated 27th June 2022 be struck out with costs.
 3. The costs of this Reference be borne by the Respondent firm of Advocates.
2. It is based upon the following grounds that in respect of the entire Bill of Costs, the Respondent law firm herein had no locus standi to present the same as there is no Advocate-Client relationship with the Applicant. That in respect of the entire Bill of Costs, the Respondent law firm was not a party to the lease agreement and consequently no privity of contract existed or exists between the Respondent law firm and the Applicant.
3. That in respect of the entire Bill of Costs, the lease agreement provided for arbitration in the event of a dispute between the Applicant and the landlord and which arbitration had not been invoked by the landlord, Mombasa Trade Centre Limited. That in respect of the entire Bill of Costs, it was a term of the lease agreement that the Respondent law firm be paid fees by the landlord, Mombasa Trade Centre Limited, in the first instance and not the Applicant. That in respect of the entire Bill of Costs herein, there are specific terms of the lease agreement that are expressly illegal and contrary to public policy



and therefore unenforceable. That in respect of the entire Bill of Costs herein, the Taxing Officer was precluded from entertaining the Bill of Costs on account of failure to exhaust alternative remedies in the lease agreement and in the face of the arbitration clause. That in respect of the entire Bill of Costs, the Respondent law firm has no direct cause of action that could entitle it to proceed for taxation against the Applicant. That in respect of the entire Bill of Costs, the Bill of costs is illegal and incapable of taxation given the clear provisions of the [Public Procurement and Asset Disposal Act](#) on procurement of services. That in respect of the entire Bill of Costs, the Taxing Officer lacked the jurisdiction to entertain and proceed to tax the same. { That in respect of the entire Bill of Costs, the Taxing Officer did not give sufficient reason and/or grounds for his Ruling.

4. That in respect of item 1 of the Bill of Costs, the same should be taxed off as illegal as the Applicant herein did not procure the services of the Respondent law firm in line with the provisions of the [Public Procurement and Asset Disposal Act](#). That in respect of item 2 of the Bill of Costs, the same is illegal and unmaintainable in the face of Section 36 of the [Anti-Counterfeit Act](#) and ought to have been taxed off. That in respect of item 3 of the Bill of Costs, the same should be taxed off as no registration of the lease agreement or evidence of payment has been presented to the Taxing Officer. That in respect of item 4 of the Bill of Costs, the same is not consistent with the provisions of Advocates Remuneration Order on making copies and should be taxed at Kshs. 960. That in respect of item 5 of the Bill of Costs, the same should be taxed off entirely as there is no evidence of the said correspondences presented to the Taxing Master and none were made and none have been itemized and particularized. That in respect of item 8 of the Bill of Costs, the same should be taxed off completely as there was no physical service of the same but was delivered by email and consequently should be taxed in the nature of a correspondence. That in respect of Value Added Tax, the same should follow the argument on item 1 above and should be taxed off as no services of the Respondent law firm were procured legally by the Applicant and no payment can be due on an illegal contractual term. That in respect of the entire Bill of Costs, the same should be dismissed in its entirety for being illegal and the basis premised on an illegality. That the purported procurement of the Respondent law firm by the landlord through the lease agreement is in any event illegal for failure to abide the provisions of the [Public Procurement and Asset Disposal Act](#) and is unconscionable and therefore unenforceable hence rendering the entire Bill of Costs incapable of taxation.
5. 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 the 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.”
6. 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 v Shah and Others* (2002) EA 64 and *Joreth Ltd v 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 v Shah and Others* (2002) EALR 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".

7. These principles reiterate the position of the Court of Appeal in *Joreth Ltd v 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.
8. I have carefully perused the court record and considered the rival contentions herein. The Respondent submitted that the Applicant law firm herein had no locus standi to present the same as there is no Advocate-Client relationship with the Applicant. That in respect of the entire Bill of Costs, the Respondent law firm was not a party to the lease agreement and consequently no privity of contract existed or exists between the Respondent law firm and the Applicant. The retainer is disputed in this matter in regard to the agreement of lease dated 31st July 2018 between the Respondent and the Land Lord. I have perused the said lease agreement and Term 23 of the Agreement termed subject to the agreement to lease stated provided as follows;

Legal Costs

9. The costs of preparing and completing the lease together with the stamp duty, registration fees and any other disbursements shall be borne by the Tenant and paid directly to the Landlords lawyers on demand from the lawyers."
10. Clause 1.20 of the lease reiterates this position. From the said Agreement it is clear that the Respondent is the Tenant and Mombasa Trade Center Limited is the LandLord. The lease agreement was prepared by the Applicant law firm. The said agreement and lease are signed by the Respondent and witnessed by an advocate. It is clear that the Respondent was to pay for preparation of the lease in the first place and this cannot be subject to arbitration.
11. I therefore turn to the taxation. Section 51 (2) of the *Advocates Act* provides that;

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."
12. Similar position was reiterated in the case of *Musyoka & Wambua Advocates v RustamHira Advocate* (2006) eKLR where it was held: -

Section 51 of the *Act* makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer.



This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit.....”

13. The procedure provided in section 51(2) of the *Advocates Act* aids expeditious disposal of cases relating to recovery of advocate-client costs as long as: (1) the costs have been taxed by and certified under the hand of the taxing master by a Certificate of Costs; (2) the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and (3) there is no dispute on retainer. In such case, judgment is ordinarily entered in the sum in the Certificate of Costs upon application by the advocate. The application may be commenced by way of a Notice of Motion which in law is potent tool for originating a suit. I find that the Respondent in this application were properly instructed as per the provisions in the agreement and the lease and are entitled to their fees. I find that this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

