



**Kenya Aids Ngos Consortium & another v Urthur Ingutya &  
Co. Advocates & another (Miscellaneous Reference Application  
E060 of 2023) [2024] KEELC 1766 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1766 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS REFERENCE APPLICATION E060 OF 2023**

**AA OMOLLO, J**

**APRIL 11, 2024**

**BETWEEN**

**KENYA AIDS NGOS CONSORTIUM ..... 1<sup>ST</sup> APPLICANT**

**KENYA AIDS NGOS CONSORTIUM ..... 2<sup>ND</sup> APPLICANT**

**AND**

**URTHUR INGUTYA & CO. ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**URTHUR INGUTYA & CO. ADVOCATES ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. For determination and two applications. The first is the Chamber Summons dated 6<sup>th</sup> October 2023 premised on brought by the Applicant seeking to be granted the following reliefs;
  - a. The Applicant be granted leave to file a Taxation Reference to this Honorable Court against the Ruling of the Honorable Court’s Taxing Officer delivered on 19.9. 2023.
  - b. The leave granted in prayer (1) above do operate as stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings.
  - c. The Application for Reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.
  - d. The costs of this application be in the cause
2. The application was premised on several grounds stated on its face inter alia:
  - i. The Applicant wishes to file a Reference against the decision of the Taxing Officer to tax the Bill of Costs at Kshs.31,324,029.355/=. This is because the amount in item 1 of the Bill of Costs, which was taxed and allowed at Kshs.9,000,000/=, is manifestly excessive and contrary



to the law and principle and should thus be reduced and the amount in item 2 of the bill of costs which was taxed and allowed at 11,854,439.57 was based on wrong principles of taxation in that the taxing master should have used her discretion as opposed to the figure in the counterclaim which is unsupported.

- ii. The reference has overwhelming chances of success.
  - iii. It is in the best interest of justice that this application is allowed and orders issued accordingly.
3. The application was also supported by the affidavit of Mogambi Samuel sworn on even date and which restated the facts set out in the grounds on the face of the application.
  4. The Respondent filed grounds in opposing the application stating that;
    - a. The reference is misconceived to the extent that it alleges misapprehension and misapplication of legal principles without outlining them and demonstrating the error on the part of the taxing master.
    - b. The reference lacks merit the taxing master considered the bill of costs and the application in opposition to it fully while explicitly giving for her decision.
    - c. The reference is misconceived to the extent that it seeks for orders directing a taxing master on how to tax a bill in utter disregard of the taxing master's discretion.
    - d. The reference is bereft of merit and is brought to delay or avoid payment of fair fees taxed.
  5. The second application is a notice of motion dated 3<sup>rd</sup> October 2023 filed by the Respondent herein. It sought for the following orders;
    1. This Honourable court be pleased to enter judgement in favour of the applicant against the respondents herein, jointly and severally, for the sum of Kshs.31,324,029.355/: (Thirty one million three hundred twenty four thousand twenty nine and three hundred fifty five cents).
    2. This Honourable court be pleased to order that the stated sum do attract interest at court rates (14%p.a) from the date of taxation until payment in full.
    3. The costs hereof be provided for.
  6. Mr Arthur Ingutia deposed in support of the application that there is no dispute as to retainer and the amount has not been paid. He avers that the certificate of costs has not been set aside and he annexed a copy of the certificate marked as AA. He urged that the judgement be entered as prayed.
  7. Both parties filed their respective submissions in support of and against each of the applications. The applicant/client submitted that The figure of Kshs. 776,962,638 which the taxing master formed as the basis for calculating the instruction fees payable for the counterclaim under the paragraph, is said to include damages for violation of the defendants' constitutional rights and exemplary damages for violation of the defendant's constitutional rights without disclosing how the figure for violation of the rights was arrived at. That the subject buildings which are alleged to have valued Kshs.508,563,638 were not identified in the counterclaim and their respective valuations were not given. The Applicant/client avers that the taxing master did not consider that the Applicant had paid some fees to wit Kshs.500,000 to the Respondent in arriving at the figure payable to the respondent as his fees despite the same not being denied by the Respondent.



8. They fault the taxing master for taxing item 1 at Kshs.9,000,000/= in respect of instructions fees for taking over and prosecuting the suit on behalf of the Respondent while stating that the value could not be ascertained from the pleadings filed. However, contrary to the finding of the Honorable Taxing Master, value of the subject matter can be ascertained from the valuation report that was filed in the further list of documents of the Plaintiff (Client/Applicant) herein dated 11<sup>th</sup> January, 2022 at Kshs.26,000,000. They urged this court to find that the taxing master proceeded on wrong principles.
9. In respect to item 2 of the bill, they submitted submit that the Honorable Taxing master was wrong in using the amount pleaded in the Counterclaim as basis for determination of the instruction fees while the same absolutely did not have any basis. They contend that there was no value ascertainable from the counter claim and argued that the taxing officer ought to have used her discretion to determine the instruction fees. In support of this submission, the cited the Court of Appeal in the case of *Moronge & Company Advocates v Kenya Airports Authority* [2014] eKLR where the court had this to say regarding an amount pleaded in a pleading but has no basis hence cannot for the basis for calculating the instruction fees;

“A plain reading of the above paragraph shows, without doubt, that it was not possible to determine the value of the subject matter of the suit from the pleading. We say so, because the subject parcels of land were not identified. Their respective valuations were not given. The alleged developments were not particularized. The figure of Kshs.25,542,000,000/= given in the paragraph was also said to represent loss to the plaintiffs, their children, their representatives, future grandchildren and great grandchildren without disclosing how the figure was arrived at.....

As the value of the subject matter could not be determined from the pleadings, judgment or settlement, the taxing officer should have used his discretion to determine such instructions fees as he considered just, considering, amongst other matters, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.

10. The Respondent/advocate submitted that the learned taxing master reached correct conclusions and supported their argument by the case of *Kenya Tea Development Agency Ltd -Vs- J.M Nlenga & Co. Advocates*. (High court) held:-

“..... a new advocate coming onto a matter somewhere in the middle of the proceedings in the High court will be entitled to the full instruction fee prescribed in part A of the schedule VI of the order A client who changes Advocates in the High Court therefore can expect to pay full instruction fee as many times as he pleases to change Advocates, notwithstanding that he can recover only one instruction fee in a party and party taxation, unless there is a judge's certificate for more than one counsel.”

11. The Respondent distinguished the case of *Kenyariri & Associates Advocates versus Salama Beach Hote1 Limited & 4 others* l2OL4 I eKLR which the applicant relied on submitting that the facts of that case showed the advocate was instructed after judgement had been entered hence they were not entitled to any instructions fee. The Respondent submitted further that the taxing master considered various factors before arriving at the figure of Kshs.9,000,000/: (Nine Million) while taxing off Kshs.5,220,000/: (Five Million Two Hundred Twenty Thousand) and so did not fall in error.
12. In regard to item 2 of the bill, the Respondent submitted there was no error and cited the case *Otieno, Ragot & Company Advocates -vs- Kenya Airports Authority* (202L) eKLR in which the Court of



Appeal considered whether a claim for special damages in the plaint disclosed the value of the subject matter and held that:

“Further, by Order 4 Rule 2, in suits seeking recovery of money, the Plaintiff must state the precise amount claimed. Going by the foregoing command, the Plaintiffs in the original suit were not expected to plead more than they did. In compliance with the rule they stated the precise amount that they were claiming from the respondent. It is impermissible to plead evidence, for example, of how the amount claimed was arrived at or such other details ... In the instant case, the amount claimed was expressly and specifically pleaded on the plaint as Kshs.13,932,000,000. The success or failure of the claim and the proof of loss and damages could only be determined by the kind of evidence those plaintiffs would have presented to prove the size and value of their respective parcels of lands, as well as the nature and values of the developments on the parcels of land in question. With that, I answer the first question in the affirmative that the value of the subject matter was ascertainable from the pleadings would have presented to prove the size and value of their respective parcels of lands, as well as the nature and values of the developments on the parcels of land in question.”

13. I have perused the Ruling rendered by the taxing master which forms the gist of this application. The taxing master at the last paragraph in page 3 gave her reasons for taxing the instruction fee on the claim at Kshs.9,000,000. She acknowledged that the value of the property was not ascertainable from the Plaintiff but considered the nature of the suit, the competing claim of ownership and the documents and proceedings on the court record for settling on the sum of Kshs.9,000,000. Since the taxing master clearly stated she exercised discretion in reaching the contested figure, this court on appeal is called to determine whether the exercise of the discretion was done in error of principle to warrant the review.

14. Under Schedule 6 of the *Advocates Remuneration Order* (costs of proceedings in the High Court), provision is made on charging instructions fee both for suits whose value is pleaded and not pleaded. The taxing master stated this was applied in the taxation. The respondent cited the case of *Joreth Limited versus Kigano & Associates* [2002] eKLR, where the court held thus;

“We have found that the learned judge erred in reassessing the instruction fee and we have also found that the taxing officer applied correct principles in arriving at the figure of instruction fee that he awarded. What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle”.

15. Consequently, the applicant is required to demonstrate the error in principle committed by the taxing master. The Supreme Court of Uganda in the case of *Bank of Uganda versus Banco Arabe Espanol SC* Civil Application No. 23 of 1999, stated thus;

“save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount. Secondly, an exceptional case is where it is shown expressly or by inference in assessing or arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong



principle is capable of being inferred of an award of an amount which is manifestly excessive or manifestly low.” (underline mine for emphasis)

16. According to the Applicant, the value of the property that the taxing master ought to have used was Kshs.26,000,000 as stated in the valuation report filed on 11<sup>th</sup> January 2022. Besides other issues, the taxing master took cognizance that the suit property measuring 4.45 is situated in Langata, Nairobi thus its of a high value to warrant the assessment of the instruction fee at Ksh.9,000,000. Since the taxing master stated that she considered the pleadings and documents on the court record. It is my considered opinion and I so hold that besides location of the property, those documents ought to have guided the value used to determine the instruction fee. Hence, there was an error in principle in assessing and or arriving at the quantum of the fee allowed. The reference succeeds on this item which I now refer back to the Deputy Registrar to tax.
17. The second argument by the applicant that item 2 was also taxed in error of principle is misplaced. A counter-claim is a suit by itself and as clearly stated in scheduled 6 that values can be determined on the face of the pleadings. Consequently, the instructions to the Respondent was defend the counter-claim as filed and whether or not those special damages claimed would be proved are neither here nor there. I decline to interfere with the decision of the taxing master on this limb.
18. On the issue of costs, since the reference has partially succeeded, I order that each party to meet their respective costs.
19. The next issue concerns the request for judgement by the Respondent over the taxed costs. Since the taxation on the instructions fee on the original claim has been referred back for assessment by the taxing master, it is premature to enter judgement in favour of the Respondent. Consequently, the application dated 3<sup>rd</sup> October, 2023 is struck out with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> APRIL, 2024**

**A. OMOLLO**

**JUDGE**

