



**Frederick Orego & Collins Odhiambo t/a Orego & Odhiambo Advocates
v China Road & Bridge Corporation (Environment & Land Miscellaneous
Case E118 of 2023) [2024] KEELC 4236 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E118 OF 2023**

MD MWANGI, J

MAY 9, 2024

BETWEEN

**FREDERICK OREGO & COLLINS ODHIAMBO T/A OREGO & ODHIAMBO
ADVOCATES ADVOCATE**

AND

CHINA ROAD & BRIDGE CORPORATION CLIENT

*(In respect of the Advocate’s application dated 5th December,
2023 and the Client’s application dated 11th December, 2023)*

RULING

Background

1. This is a Ruling in respect of two separate applications. The first application is dated 5th December, 2023. It is brought by the Advocate/Applicant. It seeks the following orders: -
 1. That this Honourable Court be and is hereby pleased to enter judgement for the Advocate against the Client in the sum of Kenya Shillings Twenty-Eight Million Three Hundred and Fifty-Two Thousand One Hundred and Twelve and Sixty-Six Cents (Kshs. 28, 352, 112.66) with interest at 14 % per annum with effect from 29th November, 2023 until payment in full.
 2. That the Advocate be allowed to execute the judgement herein against the Client, China Road and Bridge Corporation Kenya.
 3. That the costs of this application be provided for.
2. The second application is the Chamber Summons dated 11th December, 2023. It is brought by the Clients/Respondents. It seeks the following substantive orders: -



- a. That this Honourable Court do set aside in its entirety the Ruling and reasoning of the Learned Taxing Officer, Honourable Judith Omollo (DR) dated and delivered on 29th November, 2023 taxing the Advocate's Bill of Costs dated 4th May, 2023 at the sum of Kshs. 28,352,112.66.
 - b. That in the alternative to the above prayer, the Honourable Court do set aside the Taxing Officer's decision with respect to items 1 to 62, 64 and 69 to 74 of the Advocate's Bill of Costs dated 4th May, 2023.
 - c. That in the alternative, the Honourable Court do remit the Advocate's Bill of Costs dated 4th May, 2023 before a different taxing master for fresh taxation with appropriate directions thereof.
 - d. That costs be provided for.
3. The Court directed that both applications to be heard concurrently. I will begin with the Client's application being a Reference that is challenging the ruling of the Taxing Master.
 4. The Client's Reference is based on the grounds on the face of it and further supported by the Affidavit of William Ouko, its Public Relations Officer, sworn on the 11th December, 2023. The deponent avers that the Advocate- Client Bill of Costs dated 4th May, 2023 arose following the Judgement in ELC 925 of 2015 delivered on 27th April, 2023. The Client asserts that the Party-to- Party in the main suit (ELC 925 of 2015) are yet to be taxed.
 5. He avers that it is a mandatory step to establish the Party-to-Party costs in a matter before proceeding to tax an Advocate- Client Bill of Costs as the latter is a derivative of the former. The deponent avers that when Party-to- Party costs are eventually taxed, there may be a disparity in the taxation of the various items in the Party-to-Party costs and the Advocate –Client costs taxed herein. The Client's application was preceded by an objection notice in writing to the Deputy Registrar dated 1st December, 2023 requesting for reasons for the taxation of the objected items.
 6. The Client contends that value of the suit property used by the Taxing Master was based on unjustified value as the subject land is public land and its value cannot be determined like private property. Further, that the Taxing Officer taxed items 2 to 50, 52 to 62 and 69 to 74 without considering whether the quantities referred to were correct, and whether the days listed as attended were indeed attended or the documents allegedly filed were paid for as the same was not proved by the Advocate. He further states that the Taxing Officer included VAT in her computation-item 64 despite the Advocates not tendering any proof that they are registered for VAT.

Replying Affidavit

7. The application is opposed by the Advocate vide the Replying Affidavit sworn by Olendo Cecilia on the 25th January, 2024. The Advocate avers that the allegation that Advocate's costs cannot be taxed before party and party is misplaced. The value of the subject matter was determined from the Plaint as the Plaintiff sought for Judgement in the sum of Kshs. 822,250,000/= together with the special damages of Kshs. 5,122,930/=.
8. Regarding the assertion that the suit property should not be valued like private property, the deponent avers that the same is misleading as the trial court agreed that the suit property had already been compulsorily acquired before the construction of the road.
9. He further asserts that the Taxing Officer included VAT in her computation as the Law Firm is duly registered and has a KRA Registration Certificate. He denies that the allegations that the amounts



awarded are exorbitantly high and excessive as the value of the subject matter was determined from the Plaintiff and hence the taxing officer was right to award the instructions fees as taxed. The Client's application is just but a delaying tactic. The Client has not denied that the Advocate represented it in the main suit ELC 925 of 2015.

Supplementary Affidavit

10. The Client filed a Supplementary Affidavit by William Ochieng Ouko deponed on the 13th February, 2024 in response to the Advocate's Replying Affidavit. The deponent avers that the judgement in the main suit held that the suit property has been public land since 1972 when it was compulsorily acquired and did not become private land on 27th April, 2023 when the said judgment was delivered.
11. He avers that the venue of the suit property cannot therefore be held to be commensurate to private land as presented by the Plaintiff in the main suit. Therefore, taxation ought not to be on the basis of the pleadings therein.

Court's directions

12. The court directed that the Application be canvassed by way of written submissions. Both parties complied and filed their respective submissions. The Client's submissions are dated 20th February, 2024 whereas the Advocate's submissions are dated 22nd January, 2023. The Court has had occasion to read the submissions which now form part of the record of the court.

Issues for determination

13. The Court has considered the instant application, the pleadings herein, the written submissions, the impugned Ruling, the cited authorities and the relevant provisions of law and finds the issues for determination are as follows: -
 - a. Whether the Reference dated 11th December, 2023 is merited?
 - b. Who should bear the cost of this application?

Analysis and determination

A. Whether the Reference dated 11th December, 2023 is merited?

14. I start by noting that the Client has cited the provisions of the *Civil Procedure Act*. The *Advocates Act* and the Advocates Remuneration Order for that matter is a complete code in itself on matters of taxation of costs and as such, a party cannot invoke the provisions of the *Civil Procedure Act* or Rules for purposes of challenging any decision of the Taxing Officer.
15. Rule 11 of the Advocates Remuneration Order provides the procedure an aggrieved party should follow in order to challenge a ruling on taxation of costs. It provides that:
 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.
16. The procedure contemplated above is:
- a. The aggrieved party issues a notice within 14 days on the items objected;
 - b. The Taxing Officer shall forthwith give reasons for his decision;
 - c. Upon receipt of the reason, the objector shall within 14 days file an application by way of chamber summons setting out grounds for objection
 - e. If dissatisfied with the decision of the Judge, the objector shall with leave of court appeal to the Court of Appeal.
17. The Court notes that the Applicant has complied with all the requirements outlined in Rule 11 above. The Ruling by the Taxing Master was delivered on the 29th November, 2023. The Client filed the Notice of Objection vide the Letter dated 1st December, 2023 and subsequently the instant Reference on 11th December, 2023. That is within 14 days after delivery of the Ruling. The Court will proceed to consider the application on its merits.
18. It is important to emphasize at this point that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. This Court will not lightly interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in injustice. The Court in the case of *Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board* [2005] eKLR was categorical that:
- “On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”
19. The proper exercise of discretion by the Taxing Officers was restated in *Kamunyori & Company Advocates –vs-Development Bank of Kenya Limited* (2015) Civil Appeal 206 of 2006, where it was held that:
- “...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside”
20. The Applicant is seeking an order that the ruling delivered on 29th November, 2023, be set aside. The principles for setting aside the decisions of Taxing Master were well established in the cases of



Premchand Raichand Limited & Another –vs- Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd. –vs- Kigano and Associates (2002) 1 EA 92. These includes:

- a. That there was an error of principle
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
 - d. That so far as practicable there should be consistency in the award.
21. With these principles in mind, the issues for determination are whether, the Taxing Officer herein rightly exercised her discretion in determining and taxing off instruction fees in the Advocate- Client Bill of costs dated 4th May, 2023.
22. In the case of Joreth Ltd -vs- Kigano & Associates [2002] 1 E.A. 92, the Court addressed the issue thus:
- “We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case), but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”
23. There are two limbs of this passage which the Court wishes to emphasize. First, in taxing an Advocate’s Bill of Costs, the value of the subject matter must be ascertained a priori. Where the value of the subject matter of a suit is known or can be determined from the pleadings, judgment or settlement, the Taxing Officer has no discretion in assessing instruction fees. However, where the value of the subject matter is unknown or cannot be ascertained, then the Taxing Officer is expressly permitted, in exercising his or her discretion to take into account any such matters as he or she may consider just to assess instructions fees.
24. Before delving further as to whether the Taxing Officer rightly exercised her discretion while taxing the Bill of Costs herein, it is imperative to deal with the Client’s contention that it is a mandatory step to establish the Party-to-Party costs in a matter before proceeding to tax an Advocate-Client Bill of Costs as the latter is a derivative of the former. The Client does not however deny that it instructed the Advocate to act for it in the main suit, ELC Suit Number 925 of 2015.
25. It is settled principle that instruction fees are earned when the Advocate acts on the Client’s instructions be it prosecuting or defending a suit by filing the defence. There is no provision in law that Party and Party costs have to be taxed first before taxing the Advocate-Client Bill of costs. The Advocates Remuneration Order under Schedule VI, which is the applicable provision is divided into two sections; Part A which provides for party and party costs, while Part B deals with Advocate and client costs.
26. Schedule VI, prescribes how instruction fees for both party and party and advocate and client are to be assessed with Part A setting out different parameters for arriving at party and party costs. Schedule VI Part B on the other hand makes it patently clear that instruction fees for advocate and client costs will be the party and party costs prescribed plus one-half.



27. It follows that to determine instructions fees for Advocate- Client costs where Party –to-Party costs are yet to be taxed, the Taxing Master has to first determine the instruction fees payable between Party and Party then increase it by 50%.
28. In the instant suit, although Party-to-Party costs were yet to taxed, the Taxing Master in her Ruling first determined the Instruction fees payable then increased it by one-half.
29. The Client in its submissions, cited the case of Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] eKLR in which the learned Judge stated that:

“It therefore stands to reason that Part B, being Advocate and client costs cannot be ascertained independently unless and until Part A is determined, since the instruction fees in Part B is an arithmetical computation derived from the instruction fees in the party and party costs determined in Part A.”
30. I agree with the Learned Judge in the above cited decision. What I understand the Judge to be saying is that before determining instruction fees under Advocate –Client, the Taxing Master has to first calculate the instruction fees payable as Party-to- Party then increase it accordingly.
31. Further, and as duly noted by the Taxing Master in her Ruling, in the Otieno, Ragot & Company Advocates (Supra), the Party –to-Party costs had already been taxed and a Certificate of Costs issued. The Taxing Officer therein purported to determine the instruction fees afresh without considering the costs stated in the Certificate of Costs. That is not the case herein.
32. Turning back to the taxed instruction fees, having perused the Bill of Cost, it is not in doubt that the value of the subject matter of the suit was ascertainable from the pleadings. It is the said value that the Taxing Master considered while calculating the instruction fees in the Advocate-Client Bill of Costs.
33. The Client further argued that the suit property was public land hence it cannot be valued as a private property. In my view, the argument does not hold any water. I say so because the Taxing Master has to only consider the parameters set in the Advocates Remuneration Order as cited in Joreth Ltd v Kigano & Associates (Supra). No other factors such as whether the subject property was public property or not are to be considered.
34. Further, that the Taxing Officer is faulted for taxing items 2 to 50, 52 to 62 and 69 to 74 without considering whether the quantities referred to were correct, whether the days listed as attended were indeed attended or the documents allegedly filed were paid for as the same was not proved by the Advocate. I have perused the said Bill of Costs, the contested items are on services rendered in receiving documents, serving, drawing and various court attendances. The Taxing Master noted that the items were drawn to scale. I find no basis in faulting her considering that she had the advantage of counter-checking the same from the parent file.
35. The other complaint by the Client is that the Taxing Officer included VAT in her computation-item 64, despite the Advocates not tendering any proof that they are registered for VAT. The Advocate has produced a KRA Registration Certificate.
36. In the case on Otieno, Ragot & Company Advocates -vs- Kenya Airports Authority [2021] eKLR the Court of Appeal stated:

“Once the instruction fees were ascertained by increasing instruction fees in the party and party bill by one-half, the taxing officer is thereafter entitled to scrutinize the remaining items of the bill and determine only those costs that are due to the advocate which are then



increased by one-half. It is on the remaining items in the bill that the taxing officer is allowed to exercise his or her discretion to arrive at the correct amount due. Whereupon, the total of the instruction fees, and the costs increase by one-half, would result in the taxed Advocate and client costs.”

37. I have considered the other itemized costs as taxed by the taxing officer, and find that for the reasons specified, I have no basis upon which to interfere with those amounts as taxed.
38. In conclusion, I find that the taxing officer adhered to the provisions of the Advocates Remuneration Order and applied Schedule VI Part B to the Advocate-Client Bill of costs, I find no basis of interfering with her decision.
39. I am therefore inclined to dismiss the Reference with costs to the Advocate.

The Advocate’s Application

40. Turning to the Notice of Motion dated 5th December, 2023, the Advocates seek entry of judgement as per the Certificate of Taxation issued after the taxation of the Advocate-Client Bill of Costs. The Applicant states that the Client was notified and supplied with the Certificate of Taxation for a sum of Kshs. 28,352,112.66. Further that there are no outstanding issues for determination hence it is only just and fair that the orders sought are granted.
41. The Client opposed the application vide the Replying Affidavit of William Ochieng’ Ouko deponed on the 13th February, 2024. He asserts that the application is premature and misguided based on the Reference. That a Reference is a bar to the Advocate’s application for entry of judgement.
42. Having dismissed the Reference, I will proceed and consider the Advocates’ application on merit. Section 51(2) of the [Advocates Act](#) which states that:

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- (2) The certificate of the taxing officer by whom a 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.

43. From the foregoing provision, the Certificate of Costs is conclusive as to the amount unless set aside by way of a reference under Rule 11 of the Advocates Remuneration Order.
44. The court in *Owino Okeyo & Company Advocates -vs- Fuelex Kenya Limited* [2005] eKLR reaffirmed the above position when it held the following:

“In my understanding of the provisions of Section 51 (2) of the [Advocates Act](#), it enables an advocate to get judgment for the taxed costs...provided that his client did not dispute the fact that the advocate had been instructed (or retained) in the first instance.”

45. Since I have dismissed the Reference by the Client, I have no option but to enter judgement in favour of the Advocate as per the Certificate of Taxation dated 6th December, 2023.



46. On the aspect of interest at 14 % per annum on the costs taxed, Rule 7 of the Remuneration Order Rule 7 provides:

“An advocate may charge interest at 14% per annum on his disbursements and cost, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

47. In the case of P I Samba and Company Advocates -vs- Buzeki Enterprises Limited [2022] eKLR, this Court relied on the Court of Appeal decision in Otieno Ragot & Co. Advocates vs Kenya Airports Authority (Supra), where the court had stated that: -

“The rule (rule 7) deals with interest chargeable by an advocate in respect of its claim for disbursement and costs following submissions of a fee note. It is patently clear from the rule that interest begins to accrue from the expiry of one (1) month from the date of delivery of the bill or fee note. The learned judge’s reasoning that the rule does not specify the date from which time begins to run was therefore a misdirection.....

..... Additionally, it is distinctive that a review of the applicant’s Bill of Costs does not disclose that the applicant included a charge for ‘...interest at 14% per annum on his (her) disbursements and costs...’ in the Bill of Costs. As the sole basis upon which computations of amounts due to an applicant are determined by the taxing officer, the element of interest defined by rule 7 ought to have been included in the Bill of Costs, but it was not. This omission would thereby negate the application of rule 7, and instead render the bill liable to an exercise by the court of its discretion under section 26 of the Civil Procedure (Act).”

48. I have looked at the bill of costs that was drawn, filed and presented by the Advocate/Applicant in this matter. The Advocate did not include a charge of interest at 14% per annum which he now claims in his application. Guided by the above cited binding authority, Rule 7 cannot therefore apply in this case. I am only then left with the provisions of section 26 of the [Civil Procedure Act](#).

49. The Advocate has presented the Letter dated 29th November, 2023 in which he informed the Client of the taxation of the Bill of Costs at a sum of Kshs. 28,352,112.66. Exercising this court’s discretion under section 26 of the [Civil Procedure Act](#), the court will instead award the Advocate/Applicant interest at the rate of 14% per annum from 29th November, 2023 until payment in full.

50. Once judgement is entered in his favour, the Advocate does not require any further authorization from this court to execute the judgement. It follows, as night falls day that the Advocate is at liberty the judgement entered in his favour. The prayer that he be allowed to execute the judgement herein is therefore unnecessary.

51. The net result of my findings is as follows:

- a. The Chamber Summons dated 11th December, 2023 be and is hereby dismissed with costs to the Advocates.
- b. The Notice of Motion dated 5th December, 2023 is allowed and Judgment is hereby entered for the Applicant/Advocates against the Respondent/Client for the sum of Kshs. Kshs. 28, 352,112.66 only together with interest accruing therefrom at 14% per annum with effect from 29th November, 2023 until payment in full.
- c. The Advocates are awarded costs of both applications.



It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MAY, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of

Ms. Olendo holding for the Appellant

Mr. Kibaara for the Client

Yvette: Court Assistant

M.D. MWANGI

JUDGE.

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