



**Thamaini v Wangai & 2 others (Environment & Land Case  
E246 of 2021) [2024] KEELC 4922 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4922 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E246 OF 2021**

**JO MBOYA, J**

**JUNE 24, 2024**

**IN THE MATTER OF RULE 11 OF THE ADVOCATES  
(REMUNERATION) ORDER 1962 REFERENCE ON TAXATION**

**-BETWEEN-**

**BETWEEN**

**EPHRAIM MIANO THAMAINI ..... APPLICANT**

**AND**

**NANCY WANJIRU WANGAI ..... RESPONDENT**

**AND**

**ELINA MWAYITSI NAKAYA ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. The instant Application/Reference dated 21<sup>st</sup> August 2023, brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Rule 11 of the Advocates (Remuneration) Order 1962 and in respect of which the Plaintiff/Applicant prays for the following orders;
  - i. That the Decision of the Taxing Officer, Hon. D. Orago (Dr), as evidenced in the Ruling delivered on 24th July 2023 with respect to items 1, 3, 4, 5 and 8 in the 1st Defendant's Party and Party Bill of Costs dated 9th June 2022 be set aside and the bill of costs in relation to the aforementioned items be taxed afresh.



- ii. That in the alternative, this Honourable Court be pleased to order that the 1st Defendant's Party and Party Bill of Costs dated 9th June 2022 with respect to items 1, 3, 4, 5 and 8 be taxed afresh by a different Taxing Master and/or make any appropriate directions to a fresh taxation.
  - iii. That the costs of this Application be provided for
2. The instant Reference is premised and/or anchored on the numerous grounds which have been highlighted at the foot of the application. Furthermore, the application is supported by the affidavit of the Applicant sworn on even date [21<sup>st</sup> August 2023] and to which the deponent has annexed a total of Eight [8] documents thereto.
  3. Notably, the Applicant herein contends that the learned taxing officer erred in law and in principle in taxing the impugned items contrary to and in contravention of the prescribed fees contained in the body of the Advocates Remuneration Order 2014. Besides, the Applicant contends that the awards made over and in respect of items numbers 1, 3, 4, 5 and 8, respectively are exaggerated and hence same ought to be interfered with.
  4. Upon being served with the chamber summons application [ Reference] the 1<sup>st</sup> Respondent filed a Replying affidavit sworn on the 1<sup>st</sup> November 2023 and wherein same [1<sup>st</sup> Defendant/Respondent] has contended that the certificate of taxation by the taxing master accords with the prescription of the law and thus the reference before the court ought to be dismissed.
  5. Suffice it to point out, that the Reference beforehand came up for mention on the 8<sup>th</sup> May 2024 whereupon the advocates for the respective parties covenanted to canvass and ventilate the Reference by way of written submissions. Consequently, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
  6. Pursuant to the directions by the court, the Applicant herein proceeded to and filed written submissions dated 9<sup>th</sup> May 2024; whereas the 1<sup>st</sup> Defendant/Respondent filed written submissions dated the 7<sup>th</sup> June 2024. For good measure, the two [2] sets of written submissions form part of the record of the court.

## **Parties' Submissions:**

### **a. Applicant's Submissions:**

7. The Applicant herein filed written submissions dated the 9<sup>th</sup> May 2024 and in respect of which same [Applicant] has adopted the contents of the grounds contained at the foot of the chamber summons application as well as the contents of the supporting affidavit thereto.
8. Furthermore, learned counsel for the Applicant has thereafter raised, highlighted and canvassed two [2] salient issues for consideration by the court.
9. Firstly, learned counsel for the Applicant has submitted that the learned taxing master failed to properly appreciate the relevant principles which ought to have been taken into account prior to and before undertaking the taxation of the party and party bill of costs which had been filed by and on behalf of the 1<sup>st</sup> Defendant/Respondent herein.
10. In particular, learned counsel for the Applicant has contended that the learned taxing officer erred in law in taxing and certifying the instruction fees payable in the matter in the sum of Kes.300, 000/= only, even though the value of the suit property was neither discernable from the pleadings nor the Judgment [decision] of the court.



11. Additionally, learned counsel for the Applicant has submitted that the taxation on account of the instruction fees was predicated upon Schedule 6 [b] of the *Advocate Remuneration Order*, yet same ought to have been taxed pursuant to the Schedule relating to “Other Matters” not expressly provided for in the Schedule. In this regard, learned counsel for the Applicant has contended that the award on account of instruction fees is manifestly excessive and thus ought to be interfered with.
12. On the other hand, learned counsel for the Applicant has also submitted that the learned taxing officer failed to take into account that there existed another related matter, namely, Milimani ELC No E258 of 2020 between Samson Masaba Munika & Another v Nancy Wanjiru Wangai & 2 Others; which touched on and concerned the same suit property and wherein the Respondent herein had also filed a bill of costs for taxation.
13. In any event, learned counsel contended that in respect of the related matter, the Respondent’s bill of costs was taxed and certified in the sum of Kes.166, 210/= only and hence the award of costs in respect of the instant matter ought to be consistent with the taxation and the award of costs in the related file.
14. In a nutshell, learned counsel for the Applicant has therefore submitted that the failure to take into account the quantum of costs that was awarded in the sister file therefore denotes inconsistency in taxation and thus the award of costs in respect of the instant matter reflects an error in principle.
15. To this end, learned counsel for the Applicant has cited and relied on the decisions in the case of *Premchand Raichand Ltd vs Quarry Services of East Africa Ltd* [3] [1972] EA 162.
16. Secondly, learned counsel for the Applicant has submitted that the learned taxing officer also erred in principle in taxing items 2, 4, 5 and 8, without paying due regard to the provision of the *Advocate Remuneration Order*. For good measure, the learned counsel for the Applicant has invited the court to find and hold that the items alluded to were exaggerated and hence the learned taxing master ought to have reduced same in accordance with the prescription of the law.
17. Arising from the foregoing, learned counsel for the Applicant has thus contended that same [Applicant] has demonstrated that the certificate of taxation issued by the taxing officer is replete with errors of principle and hence same [certificate of taxation] ought to be set aside and the bill of costs be returned for purposes of taxation before a taxing master other than Hon. Diana Orago [Dr].

**b. 1<sup>st</sup> Respondent’s Submissions:**

18. The 1<sup>st</sup> Respondent filed written submissions dated the 7<sup>th</sup> June 2024 and wherein same [1<sup>st</sup> Respondent] has reiterated the contents of the Replying affidavit sworn on the 1<sup>st</sup> November 2023. Furthermore, learned counsel for the 1<sup>st</sup> Respondent has ventured forward and highlighted one [1] issue for consideration by the court.
19. It is the submissions by and on behalf of the 1<sup>st</sup> Respondent that the certificate of taxation which is sought to be challenged by the Applicant herein accords with the provisions of the law and hence same [certificate of taxation] ought not to be interfered with.
20. On the other hand, learned counsel for the 1<sup>st</sup> Respondent has submitted that the award on account of instruction fees was made in accordance with the provisions of Schedule 6[b] of the *Advocates Remuneration Order* 2014 and that the taxing officer even proceeded to and subjected the quantum on account of instruction fees to the requisite percentage. Furthermore, learned counsel for the 1<sup>st</sup> Respondent has submitted that the Applicant herein has neither established nor demonstrated any error of principle that inflicts and/or vitiates the certificate of taxation, to warrant an interference by this court.



21. Other than the foregoing, learned counsel for the Respondent has also submitted that item[s] 3, 4, 5 and 8, respectively were also taxed in accordance with the relevant Schedule and thus same ought not to be disturbed.
22. Simply put, learned counsel for the 1<sup>st</sup> Respondent has submitted that the Reference beforehand has failed to disclose any error of principle or such other basis to warrant an interference with the certificate of taxation. Consequently and in this regard, learned counsel for the 1<sup>st</sup> Respondent has invited the court to dismiss the Reference with costs to the 1<sup>st</sup> Respondent.

**Issues For Determination:**

23. Having appraised the chamber summons application [Reference] and the response thereto and upon consideration of the written submissions filed by and on behalf of the respective parties, the following issues crystalize [emerge] and are thus worthy of determination;
  - i. Whether the Applicant herein has demonstrated any error of principle or otherwise, which vitiates the Certificate of Taxation or otherwise
  - ii. What orders, if any ought to be granted?

**Analysis and Determination**

**Issue No. 1**

Whether the Applicant herein has demonstrated any error of principle or otherwise, which vitiates the Certificate of Taxation or otherwise.

24. The Chamber Summons Application [ Reference] beforehand seeks to challenge and/or impugn the certificate of taxation issued by the taxing master following the taxation of party and party bill of costs filed by the 1<sup>st</sup> Respondent herein.
25. To the extent that the application herein seeks to impugn the certificate of taxation, it is imperative to point out and underscore that any Applicant, the current Applicant not excepted, who seeks to impugn a certificate of taxation must demonstrate that the certificate of taxation under challenge is vitiated by errors of principle; is manifestly excessive or so high or inordinately low, so much so that the court ought to intervene.
26. Furthermore, it is not lost on this court that the taxation of party and party costs is an exercise of discretion by the taxing master and being an exercise of discretion, the court therefore ought to be slow in its endeavor to interfere with the certificate of taxation. For good measure, it is common ground that the court ought to exercise due caution and deference, whilst dealing with a Reference.
27. Be that as it may, it is not lost on this court that even though the court must exercise due caution and circumspection whilst dealing with the exercise of discretion by the taxing officer, however, where it is demonstrated and/or proved that the taxing officer/master committed an error of principle or took into account extraneous issues/factors, then the court is obliged to interfere with the exercise of discretion.



28. Pertinently, the extent and scope of the jurisdiction of the court whilst dealing with the discretion conferred upon the taxing officer was highlighted and elaborated upon by the Court of Appeal in the case of *Joreth Ltd versus Kigano & Associates* [2002]eKLR, where the court stated and 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”.

29. Likewise the scope of the jurisdiction of the court whilst entertaining a Reference on taxation was also elaborated upon by the Court of Appeal in the case of *Peter Muthoka versus Ochieng & 3 Others* [2018]eKLR, where the court stated and held thus;

They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in *Mbogo -vs- Shah* (Supra), then the decision though discretionary, may properly be interfered with. See also *Attorney General Of Kenya -vs- Prof. Anyang' Nyong'o & 10 Others*, Eacj App. No. 1 Of 2009.

It has long been the law as was stated in *Arthur -vs- Nyeri Electricity* (Supra), that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases. What we now have to decide is whether there was an error of principle which would have called upon the learned Judge to interfere with the taxing masters' decision.

30. Arising from the decisions cited in the preceding paragraphs, it is evident and apparent that though the court dealing with a Reference is seized of the requisite jurisdiction to interfere with the discretion of the taxing officer, however such interference should only arise where it is duly established that there exists an error of principle, which impacts upon the certificate of taxation and not otherwise.

31. Furthermore, it is also discernable that the question pertaining to quantum is a technical issue which ordinarily falls within the purview of the taxing officer and hence a court should be reluctant to interfere with quantum save for where it is demonstrated that the award [quantum] is either so high or so low, as to constitute an error of principle.

32. Other than the foregoing, instances, it is settled law that the exercise of discretion by the taxing officer in taxing the costs, ought to attract and receive due deference by the court. At any rate, it is common ground that the question of quantum is deemed to be a technical matter which falls with the professional competence of the taxing officer.

33. Having restated the foregoing position, it is now appropriate to revert back to the subject matter and to ascertain [discern/decipher] whether the Applicant herein has established and/or proved the requisite grounds upon which the certificate of taxation by the taxing officer ought to be interfered with.



34. To start with, learned counsel for the Applicant has contended that the taxing officer did not appreciate and/or take into account the relevant clause which should have guided the assessment and determination of the award on account of instruction fees.
35. According to learned counsel for the Applicant the taxing officer ought not to have invoked and/or applied Schedule 6 part A of the [Advocates Remuneration Order](#) but should have ventured forward and taxed the instruction fees on the basis of the clause relating to [sic] Other Matters.
36. In any event, learned counsel has added that the instruction fees ought to have been taxed at kes.75,000/= only and thereafter be subjected to 75%, taking into account that the matter was determined in a summary manner without going to full trial.
37. To my mind, the dispute beforehand touched on and or concerned a claim of ownership to and in respect of a property known as L.R No. Nairobi/Block 97/2347 [suit property] which was being disputed upon by the Applicant on one hand and the Respondent on the other hand.
38. Quite clearly, the suit property which is situated within the city of Nairobi has a value, even though same was not discernable from the body of the plaint. Furthermore, it is imperative to point out that the suit beforehand was filed at the Environment and Land Court and not the Chief Magistrate's Court for the very obvious reasons that same [suit property] had a value that exceed the monetary jurisdiction of the Chief Magistrate's Court.
39. In my humble view, the suit beforehand having been filed before the Environment and Land Court it then means that the Applicant believed that its value exceeded the pecuniary/monetary jurisdiction of the Chief Magistrate's Court.
40. Other than the foregoing, it is common ground that whilst assessing instruction fees in a matter where the value of the property is neither discernable from the pleadings, settlement nor the Judgment of the court, then the taxing officer is imbued with discretion. Nevertheless, the exercise of such discretion must be undertaken on sound principles and based on rational factors.
41. In respect of the instant matter, the learned taxing officer proceeded to and awarded the sum of Kes.300,000/= only on account of instruction fees and thereafter subjected the award in question to 75%, taking into account that the suit was determined in a summary manner.
42. To my mind, the manner in which the taxing officer exercised her discretion in arriving at and reaching the quantum on account of instruction fees, demonstrates a clear thought process duly informed by the various factors underpinned by the provisions of Schedule 6 of the [Advocates Remuneration Order](#) 2014.
43. Owing to the foregoing, I am unable to find any basis to warrant interference with the manner in which the learned taxing officer calibrated upon the question of instruction fees. Simply put, there is no error of principle that is discernable from the award on account of instruction fees.
44. Secondly, learned counsel for the Applicant has also contended that there existed another matter, which was related to the subject matter and wherein the costs were taxed in the sum of Kes.166, 210/= only and hence the taxation of costs in respect of the instant matter ought to correspond with and/or accord to the taxation in respect of the other matter namely, ELC E258 of 2020 between [Samson Masaba Munika & Another v Nancy Wanjiru Wangai & 2 Others](#).
45. Nevertheless, it is important to point out and underscore that taxation of costs constitutes an exercise of discretion and the exercise of discretion varies from one judicial officer to the other. Consequently, the fact that one judicial officer has awarded a particular figure [ amount] does not mean that the other



judicial officer, dealing with a similar or near similar dispute, would arrive at the same figure and/or outcome.

46. Pertinently, the taxation of the bill of costs is not a mechanical or arithmetic exercise, wherein the end result is determined on the basis of [sic] what may have been done by another officer. To the contrary, same is an exercise of discretion and hence no two [2] Officers are obliged to reach the same figure [outcome].
47. Notably, the foregoing exposition of the law was highlighted and indeed amplified by the court in the case of *Republic –vs- Minister for Agriculture & 2 Others* [2006] KLR it was held:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will therefore not interfere with the award of a taxing officer particularly where he is an experienced officer...”
48. At any rate, the requirement for consistency in award of costs, which was underscored in the decision in the case of *Premchand Raichand versus Quarry Services of East Africa Ltd* [1972] EA does not denote that the outcome must be the same. For good measure, consistency is not synonymous with equality and same[ness].
49. In view of the foregoing, I am unable to find any substance in the submissions by and on behalf of the Applicant to warrant an interference with the quantum of costs on account of instruction fees. [See the *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR].
50. Flowing from the foregoing, my answer to issue number one is to the effect that the Applicant herein has neither established nor proved any error of principle, to warrant an interference with the exercise of the discretion of the taxing officer as pertains to the award/quantum on account of instruction fees.

#### **Issue No. 2 What orders, if any ought to be granted?**

51. Whilst discussing issue number one, the court has since found and held that the Applicant herein has neither established nor demonstrated any error of principle or better still, has failed to demonstrate any extraneous factors that were taken into account by the taxing officer in assessing and awarding the costs at the foot of the certificate of taxation.
52. Having failed to demonstrate the requisite conditions that would have enabled this court to intervene and interfere with the certificate of taxation, what becomes apparent is that the Reference beforehand is devoid and bereft of merits.
53. At any rate, it is common ground that before a court can interfere with a certificate of taxation, the Applicant must satisfy certain parameters and/or ingredient. In any event, it is not enough to say that the award of costs is high. For good measure, one must demonstrate that the award is manifestly excessive or inordinately low, as to represent an error in principle.
54. To the extent that the Applicant herein has neither established nor demonstrated the requisite grounds for interfering with the certificate of taxation, it suffices to point out that the application beforehand is not meritorious.

#### **Final Disposition:**

55. Having considered the thematic issues that were highlighted in the body of the Ruling, it must have become apparent, nay, evident that the Chamber Summons Application beforehand is devoid of merits.



56. Consequently and in the premises, I proceed to and do hereby make the following final orders;
- i. The Chamber Summons Application [Reference] dated the 21<sup>st</sup> August 2023 be and is hereby dismissed.
  - ii. Costs of the Reference be and are hereby awarded to the 1<sup>st</sup> Defendant/Respondent.
  - iii. To avoid the filing of additional/supplemental bill of costs, such costs are hereby certified in the sum of Kes.25, 000/= only.

57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2024.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Benson/ Brian Court Assistant.

Mr. Muyundo for the Plaintiff/Applicant.

Mr. Thuku for the 1<sup>st</sup> Defendant/Respondent.

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondent.

