



M M Kimuli & Co Advocates v Brinks Security Services Limited (Miscellaneous Case E127 of 2023) [2024] KEELRC 1011 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1011 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E127 OF 2023**

JK GAKERI, J

APRIL 17, 2024

BETWEEN

M M KIMULI & CO ADVOCATES APPLICANT

AND

BRINKS SECURITY SERVICES LIMITED RESPONDENT

RULING

1. Before the court for determination is the Applicant's Chamber Summons dated 22nd November, 2023 seeking orders that;
 1. This Honourable Court be pleased to set aside and/or review the Taxing Master's findings on the question of VAT as set out in her Ruling delivered on 14th November, 2023 and this court be pleased to find and issue the following directions;
 - a. That it is neither necessary, reasonable nor feasible to require proof of payment of VAT during the Taxation of an Advocate/Client Bill of Costs.
 - b. That VAT payable is assessed and accounted to the Revenue Authority by the service provider upon receipt of payment from the customer/client. It is not therefore an advance tax; and
 - c. That VAT payable on the amount taxed ought to be assessed by this Honourable Court or by the Taxing Master in accordance with the principle in *Pyramid Motors Ltd v Langata Gardens Ltd* (2015) eKLR.
 2. The costs of this application be provided for.
2. The Chamber Summons is expressed under Section 3A of the *Civil Procedure Act* (Cap 21) and Rule 11(1) and (2) of the *Advocates (Remuneration) Order*, 2009 and is based on the grounds set out on its face and the Supporting Affidavit sworn by Morris Kimuli on 22nd November, 2023 who deposes



that the Advocates/Client Bill of Costs dated 9th June, 2023 was taxed on 14th November, 2023 at Kshs.226,630/= and the Taxing Master found that VAT was not merited for lack of proof of payment of taxes and had filed an objection to the Taxation dated 14th November, 2023.

3. The affiant deposes that the Taxing Master misapprehended and misapplied the law and principles of taxation of the Advocates/Clients Bill of Costs by not awarding VAT at the applicable rate with the possibility that the affiant could pay VAT for the Respondent out of the sum allowed after taxation.
4. That there could not have been any proof of payment in advance as the legal fees has not been paid by the client and taxes are only assessed, demanded and paid upon receipt of legal fees.
5. That it is the duty of the Advocate to collect taxes and account to the revenue authorities.
6. The affiant deposes that the Taxing Master's finding meant that an advocate should not collect VAT as there could not have been proof of payment before payment of legal fees by the Respondent.
7. That VAT is a statutory charge the affiant billed for and the application for reference has merit or entitlement to VAT.
8. That it is in the interest of justice that the ruling of the Taxing Master be set aside, re-taxed and/or reviewed on the refusal to grant VAT.

Response

9. In its grounds of opposition, the Respondent states that the application is misplaced, misconceived and unmerited as the Taxing Master was correct in principle by taxing off VAT for want of proof and the instant application is a waste of the court's time as there was no basis of allowing the item in the absence of proof of payment of VAT and could only claim or be indemnified for the amount paid as VAT and the applicant has tendered no evidence of an invoice or electronic tax register receipt from the KRA for the same.
10. Counsel urged the court to dismiss the application for reference dated 22nd November, 2023 with costs.

Applicant's submissions

11. Counsel submitted that VAT on services rendered is not an advance tax and the amount is assessed and accounted to the Kenya Revenue Authority and in this case the applicant has not been paid for the services rendered and as such cannot provide evidence of payment and urges the court to find that no proof of payment was required and further find that the Taxing Master erred.
12. Counsel relies on the sentiments of the court in *Pyramid Motors Ltd v Langata Gardens Ltd (Supra)* where the court held that VAT does not apply to party and party costs but could apply in Advocate-Client Bills or where it had been paid and evidence is adduced.
13. Reliance was also made on the sentiments of the court in *Spire Bank Ltd v Mamicha & Co. Advocates & another* (2020) eKLR to urge that there was no requirement of proof of payment of VAT and the Taxing Master erred in principle.

Respondent's submissions

14. After a catalogue of all the disputed items, counsel for the Respondent submitted that the applicant is not entitled to VAT as he had not furnished proof that the same had been paid and relied on the decision in *Kenya Commercial Bank Ltd v Stage Coach Management Ltd* (2017) eKLR where the court



held that a party was entitled to recoup VAT in circumstances in which evidence is availed to show that VAT has been paid and further submitted that the sum of Kshs.38,798.40 should be taxed off.

Determination

15. The only issue for determination is whether the applicant's Chamber Summons dated 22nd November, 2023 is merited.
16. The only contested issue is whether the sum of Kshs.38,798/= should or should not have been taxed off by the Taxing Master. While the applicant contends that it ought not have been taxed off for want of proof of payment, the Respondent's counsel urged that Taxing Master made the right decision by taxing it off as no evidence of payment was furnished.
17. It is common ground that VAT is chargeable on legal services rendered by advocates to their clients. (See Section 9(3) of the *Value Added Tax Act*).
18. In *Ngatia & Associates Advocates v Interactive Gaming and Lotteries Ltd* (2017) eKLR, the court stated as follows;

“VAT is a tax on advocates in respect of the professional fees they charge for legal services they render to their clients. It is a charge payable to the Kenya Revenue Authority and the advocate is only but a statutory agent for KRA. The levy once collected by the advocate for the legal services rendered is then remitted on a monthly basis to KRA.”
19. (See also *Ann Kimani & Co. Advocates v Kenindia Assurance Co. Ltd* (2010) eKLR, *JP Machira & Co. Advocates v MDC Holdings Ltd & 2 others* as well as *Amuga & Co. Advocates v Arthur Maina* (2002) eKLR and *Aoro v Were* (Miscellaneous Reference Application E019 of 2022) (2022) KEHC 14628 (KLR) among others).
20. Under the provisions of the *Value Added Tax Act*, VAT is payable or accountable to the KRA for services rendered at different points depending on how the advocate or provider of the services determines.
21. It is accountable on;
 - i. issuance of invoice to the client or
 - ii. receipt of payment for services or
 - iii. on rendering of the services.
22. It would appear to follow that if no invoice has been issued or advance payment made for the services to be rendered, VAT is payable by the client to the advocate for onward transmission to the KRA after services have been rendered.
23. In this case, the applicant faults the Taxing Master on the premise that she found that VAT was unmerited on the ground that the advocate had not availed proof of payment which according to the applicant was not a requirement.
24. Counsel for the Respondent on the other hand submitted that the applicant could only recoup VAT, if he had tendered evidence of having paid the same.



25. In *Pyramid Motors Ltd v Langata Gardens Ltd* (*Supra*), the court stated as follows;
- “The Bills herein concerned party and party costs and VAT could then not apply as neither party fetched or supplied services to the other. True, legal services were rendered but it is not the advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the plaintiff had paid VAT and was consequently entitled to indemnity . . .”
26. The applicant’s case is further fortified by the decision in *Spire Bank Ltd v Mamicha & Co. Advocates & another* (*Supra*), where the court stated as follows;
- “From the above, it is clear that VAT is chargeable as a statutory charge. The taxing officer erred in holding that the same was not chargeable for failure on the part of the Respondents to attach a certificate from the Kenya Revenue Authority. There is no requirement that a certificate be produced, once the money is raised as fees, the KRA will automatically require the advocate to pay VAT on the same. Accordingly, the taxing off of VAT of Kshs.1,440,000/ = was an error in principle.”
27. It is the applicant’s case that since he has not been paid for the legal services rendered to the client, he could not possibly have evidence of payment.
28. Needless to underline, the Respondent tendered no evidence of an invoice issued by the applicant or receipt of payment for the legal services.
29. It is trite that the jurisdiction of this court as regards a decision of a Taxing Master or Officer can only be invoked by way of a reference and the court will only interfere with the decision in limited circumstances as exemplified by case law.
30. In *Republic v Ministry of Agriculture & 2 others Ex Parte Muchiri W. Njuguna & 2 others* (2006) eKLR, Ojwang J. (as he then was) stated as follows;
- “The court cannot interfere with the Taxing Officer’s decision on taxation unless it is shown that either the decision was based in an erroneous principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course, it would be an error of principle to take into account irrelevant factors or omit to consider relevant factors . . . 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 . . .”
31. The Court of Appeal expressed similar sentiments in *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* (2005) eKLR.
32. In the instant Chamber Summons, the applicant’s bone of contention is the finding by the Taxing Master that he was not entitled to VAT for want of proof of payment of the tax.
33. As the authorities cited herein-above demonstrate, VAT is chargeable by the Advocate for the legal services rendered and is accountable to the KRA on receipt of payment by the client, or issuance of an invoice or after services are rendered.
34. In this case, it has not been shown that the applicant has received payment from the client or he issued an invoice for the VAT to become accountable to the KRA and arguably could not have availed proof of payment of the tax.



35. In the court's view, the Taxing Master's insistence on availment of proof payment of VAT for the claim for VAT to be awarded constituted an error of principle which justifies the court's interference with the ruling of the Taxing Master to the extent that the amount claimed as VAT ought not to have been taxed off.
36. In the upshot, the Taxing Master's finding on VAT is set aside and the same is remanded to the Taxing Master for inclusion of VAT in the Advocates-Client Bill of Costs.
37. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

