



**Gatu Magana Company Advocates LLP v Mwania (Miscellaneous Application
43 of 2023) [2024] KEELRC 1946 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1946 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION 43 OF 2023**

HS WASILWA, J

JULY 29, 2024

BETWEEN

GATU MAGANA COMPANY ADVOCATES LLP APPLICANT

AND

LAWRENCE MWANGANGI MWANIA RESPONDENT

RULING

1. This ruling is in respect of two references. The first reference was filed was by the Applicant/client vide a chamber Summons dated 11th March, 2024, brought pursuant to Rule 11(2) of the [Advocates Remuneration Order](#), seeking for Orders that:-
 1. That this Honourable Court be pleased to set aside the taxation/assessment of Item No. 152(Increased by ½ to get Advocate Client costs) taxed in the sum of 1,900,000 as drawn in the ruling dated 27.2.2024 and re-taxed or re-assess the same.
 2. That this Honourable Court be pleased to re-calculate the taxed amount of Kshs. 3,535,258.60 as there is an error resulting to an extra sum of Kshs 773,000 in the final taxed amount.
 3. That in the alternative, this Honourable Court be pleased to remit the Advocate- Client bill herein to the taxing master for taxation or re-taxation of Item No. 152 and re-tallying.
 4. That the costs of this Application be provided for.
2. The basis upon which the Application is made is that the learned Deputy Registrar made an error of principle in taxing item No. 152 as drawn in the sum of Kshs. 1,900,000 and failed to consider that she had taxed off Kshs. 2,945,552 from items 1-151 and therefore needed to assess the one-half increment using the taxed off sum of 765,448 to arrive at the sum of Kshs 382,774.
3. It is stated that the Taxing Master deducted the total off sum of Kshs 5,278,172 from Kshs. 8,813,430.60 being the total bill drawn by the Advocate without realizing that the Advocate had made an



error of addition that inflated that total Bill by an extra sum of Kshs. 773,000. Therefore, that the Taxing Master heard in Principle. Also that the amount taxed on item 152 is inordinately high that warrants the intervention of this Court.

4. The Application is also supported by the Affidavit of Joseph Nyioke Mutonyi, the advocate ceased of this matter on behalf of the Applicant, sworn on 11th March, 2024. In the Affidavit, the affiant reiterated the grounds of the Application and reiterated that Item number 1-152 should have been taxed at Kshs 382,774 and the sum of Kshs 1,517,226 should have been taxed off.
5. He also reiterated that the Taxing master taxed off the sum of Kshs 5,278,172 from the sum of Kshs. 8,813,430.60 without realizing that the total sum of Kshs 8,813,430.60 as drawn by the Advocate at the foot of the Bill was incorrect.
6. He elaborated on the error made by the Advocate that the sub total with disbursements was drawn at Kshs 5,627,785 to which if he added interest on costs (Item No. 172) in the sum of Kshs. 1,197,000 to get total Bill of costs before tax in the sum of Kshs. 7,597,785 instead of Kshs 6,824,785. Hence the mathematical error resulted to an extra sum of Kshs 773,000.
7. Therefore, that the total Bill should have been costs before tax of Kshs 6,824,785, plus VAT (Item 173) of Kshs 1,215,645.60 all adding up to Kshs. 8,040,430.60 so that after correcting the two errors, the Bill ought to have taxed at Kshs 1,245,036.60.
8. The Advocate opposed the Reference by Filling grounds of Opposition dated 21st May, 2024, on the following grounds; -
 1. That the Application is based on a misapprehension of the law and facts in the matter.
 2. That the said Application is not merited, based on the grounds proffered thereon.
 3. It would be more expedient and efficacious for the Court to proceed to re-assess the Advocate/ Client Bill of costs herein based on the correct legal precepts.
9. On the same day and pursuant to leave granted by this Court on 11th April, 2024, the Respondent/ Advocate also filed their own Reference by the Chamber Summons dated 21st May, 2024, brought under Order 11(2) & (4) of he *Advocates Remuneration Order*, the *Advocates Act*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Article 159(2)(d) of the *Constitution* of Kenya, 2010 and all other enabling provision of the law seeking for the Orders that; -
 1. That pursuant to leave of Court granted to the Advocate/Applicant on 11th April, 2024, this Application be admitted out of time and be deemed as duly and properly filed.
 2. That the decision/ Ruling of the Taxing officer (Hon. M Kyallo-DR) dated 27/02/2024 on the taxation of the Advocates/Client Bill of Costs dated 14/06/2023 be and is hereby set aside.
 3. That this Court be pleased to re-tax or re-assess the Advocate/Client Bill of costs dated 14/06/2023 in its entirety.
 4. That the costs of this Application be provided for.
10. The basis upon which the Advocate filed this reference is that the ruling by the Taxing Master was delivered without notice to the Advocate and delay in filling the reference was due to lack of notice and inadvertence on the Applicant.



11. She stated that the Advocate-Client Bill of costs was drawn to scale of Kshs 8,813,430.60 but the Taxing master taxed it at Kshs.3,535,258.60 which is extremely low and not commensurate to the work done, nature of the matter and time expended in the primary suit.
12. She avers that the Taxing master's findings on instructions fees and getting up fees was based on a misapprehension of the value of the Subject matter in the primary suit. That the taxing master did not properly apply the law in calculating the instructions fees, getting up fees, VAT, attendances, drawings, perusals and service.
13. It is his position that the taxing master misapprehended the law in finding that VAT is only chargeable on Instructions fees and not all the other items.
14. She also stated that in taxing the Bill, the taxing master failed to appreciate that the amounts provided for in the Advocates Remuneration Order are bare minimum and are to be enhanced on a case to case basis depending on the nature and circumstances of each individual case. In addition, that the law provides for interest on Advocate/Client costs.
15. The Application herein is supported by the affidavit of J.W.Gatu Magana, the Advocate herein, sworn on 21st May, 2024. He reiterated the grounds of the Application and in addition added that the value of the subject matter ought to have been the total amount found due and payable in the primary suit and not just the principal sum. He added that the sum paid out to the client as per the letter of Judgement debtor dated 8th June, 2023 was the sum of Kshs. 27,085,148.
16. She reiterated that the taxing master did not consider the complexity of the matter, the urgency and due dispatch in the matter, the volume of work involved and the time expended in preparing the suit and defending the same in Court, in awarding the Advocate costs that are manifestly low in the circumstances.
17. This Reference was opposed by the Client vide the grounds of Opposition dated 30th May, 2024 based on the following grounds; -
 1. The taxing officer used the correct value of the subject matter as per the Judgement. It is the same value that was used in taxing the Party and party Bill of costs.
 2. The Application is totally defective in that it does not particularise the specific items of taxation to which the Application objects.
 3. The taxing officer correctly charged VAT on instructions fees only.
 4. That no error of principle has been specifically disclosed.
 5. That the costs taxed are not manifestly low to warrant interference with the discretion of the taxing master.
18. The two references were canvassed by written submissions.

Client Submissions

19. With regard to their Reference, they submitted on three issues; whether the taxing master erred in principle in taxing item No. 152 at Kshs. 1,900,000, whether the taxing master committed a mathematic error that resulted into an extra sum of Kshs. 773,000 in the final tally of the taxed sum and whether this Honourable court should correct the 2 errors above and determine the matter with finality.



20. On the first issue, it was argued the subject matter of this reference is the first item 152 with the particulars being “increase by minimum ½ to get advocate —client costs”. He argued that the penultimate paragraph of her ruling, the taxing officer ruled that “All other items are taxed as drawn” which meant that all items that had not been specifically considered in the preceding portion of the ruling were taxed as drawn. Among the items taxed as drawn was item No 152 with the particulars “Increase by minimum of ½ to get Advocates — Client costs” and charged at Kshs. 1,900,000. Further that in her ruling, the taxing master taxed off a sum of Kshs. 2,945,552 from items Nos. 1-151. These items were therefore taxed at Kshs 765,448/=. Therefore, the taxing master should have taxed item No. 152 at Kshs. 382,774 being one half of Kshs. 765,448 pursuant to part B of schedule 6 of the Advocates (Remuneration) Order. But she instead taxed it as drawn in the sum of Kshs. 1,900,000. That in failing to do so, the taxing officer committed an error of principle which they urge this court to correct.
21. On the second issue, it was submitted that in the last paragraph of the ruling, the taxing master taxed the bill of costs in the sum of Kshs. 3,535,258.60 without explaining how she arrived at this amount but upon scrutiny, the Respondent herein discovered that , the taxing master tallied the taxed off amount to Kshs 5,296,062/= and subtracted it from the grand total given at the foot of the bill in the sum of Kshs. 8,813,430 to get the sum of Kshs. 3,535,258.60 (but the actual amount should be Kshs. 3,517,368). In so doing, she failed to notice that the sub total described as “Total Bill/ Costs before tax” after item No. 172 had been inflated with a sum of Kshs. 773,000 to arrive at the sum of Kshs. 7,597,785. The correct total should have been Kshs. 6,824,785 (i.e. Kshs. 5,627, 785 + 1,197,000). This meant that the grand total given at the foot of the bill at Kshs. 8,813,430.60 was wrong. It ought to have been Kshs. 8,040,430.60. Therefore, that if the two errors are corrected the bill should be taxed in the sum of Kshs 1,233,557 made up of total for item Nos 1-151, of 765,448, increased by 382,774/= 1,148,222, Add disbursements (NB Item No. 168 (Kshs. 5,000 was taxed off completely) of Kshs 11,735 and VAT of 73, 600, all adding up to Kshs. 1,233,557.
22. On the third issue, it was submitted that the general rule is that where the Judge in a reference finds that the taxing master has committed an error of principle he should remit it back to the taxing master. However, there is an exception in that the court can exercise its discretion and deal with the matter with finality. In support of this, he relied on the case of *Kipkorir Titoo and Ikara Advocates v Deposit Protection Fund Board* ([2005]eKLR where the court of appeal held thus:
- “ And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D’Souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires”
23. He also cited the case of *First American Bank of Ken a Limited v Shah & Others* [2002] I EA 64. It held thus:
- “ I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees and then consider not increasing it as there are no factors to warrant an increase. I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. It would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”
24. On that basis, the Respondent urged this court to exercise its discretion and determine this matter with finality by correcting the 2 errors and tax the advocate — client bill of costs herein in the sum of Kshs. 1,233,557 to save on time.



25. On the Reference by the Advocate, the Respondent submitted also on three issues; whether the taxing officer misapprehended the value of the subject matter in assessing instructions fees and getting up fees, whether there is any basis for the court interfering with the discretion of the taxing master and whether the taxing officer erred in principle in finding that VAT is chargeable on instructions fees only.
26. On the first issue, it was submitted that the position of the law is that the value of the subject matter is determined from the pleadings, judgment or settlement. In this particular case there was a judgment of the court and the decree attached showed the decretal sum as Kshs.18,335,895, which figure was rounded off to Kshs 18,000,000 by the Advocate in preparing the party and party bill of costs dated 20th May, 2022. Therefore, that the subject matter cannot be different in the Party to Party Bill of Cost and that in the Client-Advocate Bill. In support of this, he relied on the case of *Nyaundi Tuiyott & Co Advocates v Taritta Development Ltd* [2016] eKLR where the Court held that;-
- “The law is that the value of the subject remains the same since under schedule VI, the only difference between an advocate client costs and party and party costs is that the former comprises the party and party costs calculated under part B. It’s therefore legally untenable to ascribe different values to the subject matter in the assessment of Party and party and advocate client costs”.
27. Accordingly, he argued that the Taxing master was right in using similar value of subject matter as 18,000,000 in both Bills, as the Advocate had rounded off the said figure in the Party to Party Bill of costs. Hence, the Advocate cannot whimsically, illegally and progressively change the value of the subject matter for the sole purposes of preparing her Bill of costs.
28. On the second issue, it was submitted that the law is that on a reference the Judge will not interfere with the discretion of a taxing master unless there is an error of principle or the award is manifestly excessive. In this, he relied on the court of appeal case of *Kipkorir’s case* (*supra*) which held that;
- “...on a reference to 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... The High Court in First American Bank’s case 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.”
29. Similarly, he argued that the Advocate contends that the costs awarded are manifestly low. However, she does not identify the specific items that have been taxed below the rates given in Scheduled VI of the *Advocates (Remuneration) Order*. That, without such particulars, this Court cannot by law interfere with the quantum of costs awarded by the taxing officer save in exceptional cases as was held in *Arthur v Nyeri Electricity Undertaking* [1961] EA 497 that;
- “Where there has been an error of principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases...In Nyaundi Tuiyott’s case (*supra*) the High Court held thus “The High Court cannot substitute its discretion with that of the taxing master. It is therefore not open to the court to disturb an award of costs by a taxing master simply because it could have awarded a higher or lower amount”.



30. On the last issued of whether VAT is chargeable on instruction fees only, He concede that the learned taxing master made an error of principle in charging VAT on instruction fees only and argued that VAT is charged for all the legal services, save for disbursements. In this, he relied on section 9 (3) of the Value Added Tax and the case of *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [2017] eKLR , where it was held that:-

“ 105. My view is that indeed, estoppel does not operate against the law. Equally, I am in agreement with the advocate that VAT is a statutory charge on legal services rendered to the client. However, I do not agree that VAT is chargeable on the entire award. Neither do I agree that VAT is chargeable only on instructions fees. VAT is a tax levy 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. Disbursements not being fees but refund of money spent in the preparation and actual representation of the client should not be subjected to VAT (see *Makumbi & Another v Sale Electric (U) Ltd* [190-1994] EA 306 (SC). I totally agree with the above legal position and add that the taxing officer was expected to allow VAT to all the professional fees which included instructions fees and all other items except those items where actual money like court filing fees, photocopies etc were expended by the advocate for which he was seeking in his bill of costs, a reimbursement”

31. In conclusion, it was submitted that, VAT should be adjusted to cover all the legal services charged but not disbursements. These covers item Nos. 1-152 which sums to Kshs 1,148,222. The VAT should therefore be Kshs. 183,715 and not Kshs. 73, 600 as taxed. In the final analysis the figure of Kshs. 1,233,557/= submitted in paragraphs, 6 and 8 above should be adjusted to Kshs. 1,343,672.

32. The Advocate had not filed any submission at the time of writing this ruling.

33. I have examined the averments and submissions of the parties herein. As already indicated in this ruling, there are 2 applications before me.

34. The 1st application is one dated 11th March 2024. This is a chamber summons filed under rule 11 (2) of the *Advocates Remuneration Order*.

35. Rule 11 of the *Advocates Remuneration Order* states as follows:

- “ 1. Objection to decision on taxation and appeal to Court of Appeal
- (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."

36. The 2nd Application is one dated also a chamber summons application brought under rule 11 (2) and (4) of the *Advocates Remuneration Order* of Cap 16 of the Laws of Kenya.
37. I have looked out at both applications and the supporting affidavits in support thereof, there is no indication that the Applicants wrote to the taxing officer on the items of taxation to which they were objecting to.
38. The 1st Applicant however has raised issues with item No 152 which the taxing master taxed as drawn failing to consider that she had taxed off 2,945,552/= from item No 151. Item No 152 is on Advocate-Client costs and from the ruling of the taxing master, the Petitioners party and party bill of costs dated 20/5/2022, was taxed at 949,400/=.
39. The Advocate Bill of costs dated 14th June 2023 was taxed at 3,535,258.6
40. In the second application, the Applicant seems to be objecting to the entire bill indicating that the taxing master didn't consider the complexity of the work involved and taxed down the bill as drawn.
41. In determining these two applications, I note that despite the complaints on the bill, none of the Applicants sought to understand why and what consideration the taxing master relied on to make her determination.
42. I also note that the application and especially the 2nd application is very generalized in reference to the bill and seeking an overhaul of the bill as taxed even on matter emanating from the discretionary jurisdiction of the taxing mistress which this court cannot interfere.
43. In order to resolve the issue herein, it is my view that the starting point of resolving the issues in these applications would have been to seek the reasons for the findings of the Deputy Registrar from the DR herself. This having not been done, the only recourse is to refer the bill to the taxing mistress for re-taxation or for reissue of reasons leading to her decisions.
44. I therefore remit the bill back to the taxing mistress for further consideration as per this application. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Deenambo holding brief for Magana for Applicant – present

Mutonyi for Respondent – present

Court Assistant - Fred

