



**Kogai & Company Advocates v Kapule (Miscellaneous Application E273 of 2023) [2024] KEELRC 2126 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2126 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E273 OF 2023**

**SC RUTTO, J**

**JULY 26, 2024**

**BETWEEN**

**KOGAI & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**RACHEL AMAI KAPULE ..... CLIENT**

**RULING**

1. Through a Notice of Motion Application dated 19<sup>th</sup> March 2024, the Advocate/Applicant herein prays for the following orders:
  - a. That judgment be and is hereby entered on the Certificate of Taxation dated 28<sup>th</sup> February 2024 as against Rachel Amai Kapule for the sum of Kshs Eight Hundred and Twenty Seven Thousand, Six Hundred and Twenty Five shillings (Kshs 827,625/=) only.
  - b. That Rachel Amai Kapule do pay Kogai & Company Advocates the said sum plus interest at the rate of 14% per annum from 27<sup>th</sup> November 2023 (being the 30<sup>th</sup> date from the date on which the Bill of Costs was served upon the Respondent) as provided for under Rule 7 of the Advocates Remuneration Order and Rules until payment in full.
  - c. The costs of this Application be provided for.
2. The Application is supported by the grounds therein and on the depositions contained in the Affidavit sworn on 18<sup>th</sup> March 2024, by Ms. Brenda Kogai.
3. Ms. Kogai avers that the Advocate represented the Client/Respondent in Nairobi ELRC Number E207 of 2023: Rachael Amai Kapule vs Transfer To Thunes Africa Limited. That further, the Advocate ceased to act for the Client when it was issued with a Notice of Change of Advocates dated 18<sup>th</sup> September 2023 thus necessitating the payment of legal fees for services rendered to the Client.



4. It is Ms. Kogai's further deposition that the Client refused to settle the legal fees demanded by the Advocate prompting the filing of the Client Advocate Bill of Costs dated 23<sup>rd</sup> November 2023. She further avers that the Bill of Costs was taxed at Kshs 827,625/= vide the Ruling of the Deputy Registrar delivered on 22<sup>nd</sup> February 2024 and consequently a Certificate of Taxation dated 28<sup>th</sup> February 2024 was issued.
5. Ms. Kogai contends that the Certificate of Taxation remains in force and has not been set aside.
6. Upon being served with the Motion Application by the Advocate, the Client responded by filing a Chamber Summons Application dated 27<sup>th</sup> March 2024, seeking the following principal order: That the decision of the Taxing Master don 22<sup>nd</sup> February 2024 be set aside and the Advocates Client Bill of Costs dated 23<sup>rd</sup> November 2023 taxed afresh with respect to Ites No. 1, 5, 7, 9, 10, 11, 19, 20 and 21.
7. The said Application is premised on the grounds therein and the Affidavit of Ms. Rachel Amai Kapule, the Client. In the said Affidavit which was sworn on 27<sup>th</sup> March 2024, Ms. Amai deposes she was dissatisfied with the decision of the Taxing Master, hence lodged a Notice of Objection on 4<sup>th</sup> March 2024 requesting for reasons for the decision, with the intention of filing a reference for fresh taxation.
8. It is her deposition that the Taxing Master erred in her exercise of discretion with respect to the instruction fees, as she did not take into account that she had withdrawn instructions because the Advocate did not represent her satisfactorily.
9. That further, the Taxing Master erred in her exercise of discretion by basing the instruction fee on the amount claimed in the pleadings, being Kshs 17,062,336/= without factoring in that the claim was not liquidated but was subject to the discretion of the assessing Judge.
10. She further avers that the Taxing Master erred in her exercise of discretion on instruction fees by failing to consider the reasonable probability that the amount pleaded would not be the amount awarded to her at the final determination of the claim, which is common in most unliquidated claims.
11. In the Client's view, the Taxing Master erred in her exercise of discretion in tabulation of instruction fees, as she ought to have considered the factors above and made allowance for a lesser figure against which to tax the instruction fees.
12. According to her, the amount taxed on instruction fees is therefore an unjust enrichment to the Advocate.
13. That further, the Application by the Advocate was made when she was awaiting reasons for the Taxing Master's decision. The reasons as requested have not been forthcoming which has necessitated that she proceeds to file her Application as the most expedient way to secure her interest, in light of the looming execution by the Advocate.
14. The Client's application was opposed through a Replying Affidavit sworn on 2<sup>nd</sup> May 2024 by Ms. Kogai. She further avers that the decision of the Deputy Registrar is merited since she considered all the relevant factors and the circumstances unique to this suit in taxing the items in the Bill of Costs.
15. According to Ms. Kogai, the Deputy Registrar did not consider any irrelevant factor in taxing the Bill of Costs.
16. She averred that the amount of Kshs 441,246/= allowed as instruction fees is very moderate and not excessive.



17. That further, the Advocate exercised zealous advocacy and carried out its duties with the expected diligence and professionalism thus entitling it to the fees stated in the Bill of Costs as taxed by the Deputy Registrar.
18. In Ms. Kogai's view, the Court should not 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 manifestly excessive.
19. That the Taxing Officer's decision was not based on an error of principle since she considered all relevant factors and did not consider any irrelevant factors. In her view, the decision of the Taxing Master should, therefore, not be interfered with.
20. What now comes up for determination by the Court is the aforementioned Applications dated 19<sup>th</sup> March 2024 and 27<sup>th</sup> March 2024.

### **Submissions**

21. Following the Court's directions issued on 6<sup>th</sup> May 2024, both Applications were canvassed by way of written submissions. The parties complied and I have considered their respective submissions.

### **Analysis and Determination**

22. I have considered the issues raised in the two Applications before me, the grounds in support thereof as well as the rival submissions and the following issues arise for determination by the Court:
  - a. Whether the Taxing Master erred in law and principle while taxing the Party and Party Bill of Costs herein and thereby reached a wrong assessment;
  - b. Depending on the answer in (a), whether the Court should enter judgment against the Client as per the Taxing Master's Ruling delivered on 22<sup>nd</sup> February 2024.

### **Whether the Taxing Master erred in law and principle while taxing the Party and Party Bill of Costs herein and thereby reached a wrong assessment**

23. From the record, the Ruling by the Taxing Master allowed the Advocate's Bill of Costs at Kshs 827,625.00. It is that taxation that the Client now seeks to challenge through the Application dated 27<sup>th</sup> March 2024.
24. In the case of *Kipkorir, Titoo & Kiara Advocate v Deposit Protection Fund Board* (2005) eKLR, it was stated as follows:

“On a 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 office unless the taxing officer, erred in principle in assessing the costs.”
25. Essentially, a Judge will only interfere with the exercise of discretion by the Taxing Master where there is an error in principle in assessing costs.
26. In this case, the Client has contended that the Taxing Master did not take into account the fact that the claim was not liquidated but was subject to the discretion of the assessing judge. The Client contends that the pleadings are not conclusive value of the claim.



27. On the part of the Advocate, it has been submitted that there are no sufficient reasons to warrant setting aside the Ruling of the Taxing Master and the Certificate of Taxation therefrom. It was further submitted that all the items were properly taxed as per scale.

28. It is now settled that the Court will not readily interfere with the Taxing Master's exercise of discretion except where it is shown that in awarding costs, the Taxing Master failed to take into account factors that he/she should have taken into account or took into account irrelevant factors which led to an injustice. Such was the determination in the case of *First American Bank Ltd v Shab & another* [2002] 1 EA 64 thus;

“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... it would be an error of principle to take into account relevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him...”

29. In this case, it is notable that the Taxing Master did not take into account the fact that the matter was still pending hence the instruction fees ought to have been apportioned depending on the stage of the matter. In my view, that was a relevant factor that ought to have been taken into consideration in assessing the instruction fees.

30. Evidently, the Taxing Master taxed the Bill of Costs as though the matter was already concluded and the Client awarded the decretal amount of Kshs 17,062,336/=. In my view, this was an error in principle.

31. The other aspect is the value of the subject matter. It is discernible that the Taxing Master assessed the instruction fees based on the sum claimed in the Memorandum of Claim. As the suit is still pending, it is my view that the value of the subject matter is yet to be ascertained noting that the award would be made on the basis of judicial discretion. Therefore, the value of the subject matter would only be ascertained once the Court renders its judgment.

32. For the foregoing reasons, the Court proceeds to set aside the Bill of Costs as taxed and the same is hereby remitted back to the Taxing Master for fresh taxation taking into account all factors relevant to taxation.

33. Having so found, it is not logical to determine the Advocate's Application dated 19<sup>th</sup> March 2024. In any event, I note that the Certificate of Taxation with respect to which Judgment is sought to be entered has not been annexed to the said Application.

34. There will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY 2024.**

.....

**STELLA RUTTO**

**JUDGE**

In the presence of:



Ms. Kogai for the Applicant/Advocate

Ms. Njoki for the Client/Respondent

Millicent Kibet Court Assistant

## **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**

