



**Ruto v Hotel Waterbuck Limited & another (Cause 86 of 2018)  
[2023] KEELRC 914 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 914 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 86 OF 2018  
HS WASILWA, J  
APRIL 20, 2023**

**BETWEEN**

**IAN RUTO ..... CLAIMANT**

**AND**

**HOTEL WATERBUCK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DEBRA CHELANGAT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Respondent/ Applicant's reference, Chamber Summons, dated 4<sup>th</sup> August, 2022, raised against the Ruling of the Taxing master delivered on the 12<sup>th</sup> March, 2022 with regard to the claimant's party and party bill of costs dated 10<sup>th</sup> September, 2021. The application is brought pursuant to Paragraph 11(1-4) of the *Advocates (Regulations) Remuneration Order* and Sections 1A, 1B, & 3A of the *Civil Procedure Act* and the leave of this Court granted on the 21<sup>st</sup> July, 2022. It seeks for the following orders; -
  1. That this Honourable Court be pleased to vary or set aside the decision of the taxing master contained in her ruling delivered on 12<sup>th</sup> March, 2022.
  2. That this Honourable Court be pleased to either tax the Bill of costs herein itself or remit to a taxing master other than the Hon. Margaret Kyalo.
  3. That this Honourable Court be pleased to stay execution of the Deputy Registrar's ruling on taxation dated 12<sup>th</sup> March, 2022 pending the hearing and determination of this application and or until further orders of this Honourable Court.
  4. That the costs of this Application/reference be provided for.
2. The Application is premised on the following grounds; -



- a. That the Honourable taxing master delivered her ruling on the 12<sup>th</sup> March, 2022 with regard to the claimant's party and party Bill of costs dated 10<sup>th</sup> September, 2021 taxing it at Kshs 209,560.
  - b. It is averred that the entire taxation was illegal because the taxing master ignored the Court of Appeal decision in *Joreth Ltd v Kigano & Associates* [2001] 1. EA 92 which provided that the value of the subject matter will be decided from the pleadings, judgement or settlement where it is ascertained and where it is not ascertainable the court to use discretion in determining the instructions fees and not undertake valuation of the subject matter, neither should it receive valuation from the said party.
  - c. That the taxing master erred in principle when it based the value of the subject matter on the claim rather than on the judgement rendered by the Court, giving a sum that is manifestly high in the circumstances.
  - d. On the rest of the items, the Applicant stated that the taxing master failed to consider the objection by the Applicant herein in rendering herself.
  - e. It is contended that she failed to consider the principle of reasonableness and failed to appreciate that legal fees should not be unreasonable or excessive as to deter person from accessing justice, in taxation of the Bill of costs.
  - f. It is stated that this Court has powers to either set aside the award and tax the Bill of costs itself or refer it for fresh taxation by another taxing master as was held in *Devshi Dhanji v Kanji Naran Patel* [1978] KLR 243.
  - g. In conclusion, the applicant urged this Court to allow the reference and conduct fresh taxation of the same.
3. The Reference is supported by an affidavit deposited upon on the 4<sup>th</sup> August, 2022 by Davies Kinyanjui Nderu, the Director of the 1<sup>st</sup> Respondent/Applicant.
  4. In the affidavit, the affiant reiterated the grounds of the Application and in addition stated that the award given to the claimant was a total sum of Kshs 32,000, while the taxing master gave costs of Kshs 209,560 which was excessive in the circumstances and against the principles of taxation.
  5. He also stated that as directed by the Court, they have paid the auctioneers fees of Kshs 10,000 as evidenced by annexure-7 attached to the affidavit.
  6. He maintained that the instructions fees given to the claimant is excessive in the circumstances and urged this Court to exercise its discretion and interfere with the taxing master decision, set aside the ruling and carry out fresh taxation and in the alternative refer it for taxation before any other taxing master.
  7. The application is opposed by the claimant/ Respondent who swore a replying affidavit on the 15<sup>th</sup> February, 2023, stating that his party to party Bill of costs was taxed in accordance with the law and therefore the Court should not interfere with the taxing master's decision.
  8. He stated that Bill of costs is not ascertained based on Judgement alone but also on, the care and labour required by the advocate, amount or value of the subject matter, nature of claim, importance and or difficult of the matter, complexity of the matter, interest of the party's time expended, documents prepared and general conduct of the proceedings among other things.
  9. He also stated that, according to *remuneration order* 2016, at Section 1(b), instruction fees for award ranging from 0-500,000 is Kshs 75,000 which figure is the one that was awarded by the taxing master.



10. The deponent stated that the Court relied on the amount of work done in arriving at the instruction fees awarded. Also that award of instruction fees does not necessarily have to be commensurate to the amount awarded in judgement.
11. On the other items, the affiant stated that the same were drawn to scale, in accordance with Remuneration order, 2014, a fact which was confirmed by the taxing master as such should not be interfered with. In any case that the Respondent did not specifically object to this items as required under Rule 11(1) of the [Advocates Remuneration Order](#).
12. The Respondent prayed for the reference herein to be dismissed, stating that the Bill of costs was taxed in accordance with the law and applicable principles therein.
13. The Application was disposed of by written submission with the Applicant filing on the 21<sup>st</sup> March, 2023 and the Respondent filed his on the 27<sup>th</sup> March, 2023.

### **Applicant's Submissions.**

14. The Applicant submitted that the taxing master, as stated in the case of *Joreth Ltd v Kigano and Associates* [2002] 1 EA 92, ought to have relied on the judgement of the Court in setting the instructions fees, so that the subject matter should have been the Kshs 32,000 awarded by this Court. He argued that the award given by the taxing master is so high an indication of error in principle during taxation. It was further argued that the award as granted by the taxing master offends the principle enunciated in the case of *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd* [1972] EA 162 and the case of *Nabro Properties v Sky Structures Limited* [2002] 2 KLR P.299 where the Court prohibited anyone from benefitting from their own wrong.
15. The Applicant submitted that the purpose of taxation is to indemnify a party for the loss incurred for being forced to engage counsel to assist him. In this he cited the South Africa Constitutional Court case of President of the *Republic of South Africa and Others v Gauteng Lions Rugby Union and Luyt*. On that basis it was submitted that the claim herein ought to have been filed at the magistrates Court because the salary earned by the claimant did not exceed 80,000 and in doing so, the advocates could have filed the claim in the correct forum so that the claim as awarded by the Court could have been governed by Schedule 7 of the remuneration orders which give instruction fees of Kshs. 15,000 for a claim whose award does not exceed 50,000. Having been that the claimant was represented by an advocate, the said advocate should be held personally liable for the said costs for misleading the claimant and filing this Court in the high Court instead of the Magistrate Court.
16. It was submitted further that the pleadings in the claim were drawn by the firm of Wachira Wanjira and Company advocates and not the firm of Konosi that is now seeking for instruction fees. He argued that according to the case of *Kenyariri & Associates v Salama Beach Hotel Ltd & 4 others* [2014] eKLR, instruction fees are only awarded to advocates that drew up the pleadings.
17. The Applicant submitted that, based on the circumstances in this case, the Court should interfere with the decision of the taxing master because the taxing master erred in principle in failing to give reasons for her ruling as required under the law. In this, they relied on the case of *Nyamongo and Nyamongo v Kenya Bus Services* Nairobi Milimani HCMA No 587 of 2004.
18. In conclusion, the Applicant urged this Court to re-consider the Bill of costs by the claimant and in awarding instruction fees cap it Kshs 15,000 as per schedule 7 of the [Advocates Remuneration Orders](#).



## Respondent's Submissions.

19. The Respondent submitted on two issues; whether the ruling of the taxing master should be varied and or set aside and whether the Court should tax the Bill of costs or remit it to any other taxing master.
20. The Respondent submitted that the notice of objection raised herein does not meet the criteria and form prescribed by paragraph 11(1) of the *Advocates Remuneration Order*, 2014, because the said objection does not specify the particular items the Applicant is objecting to. Furthermore, that no notice of objection has been filed by the Applicant to date.
21. On the issue raised by the Applicant that the claim herein ought to have been filed at the Magistrates Court, the Respondent submitted that when the case herein was filed in this Court, the Applicant entered appearance and submitted to the jurisdiction of this Court without raising any objection, they are therefore estopped from objecting to the jurisdiction of the Court at Taxation stage. Furthermore, that the Gazette notice number 6024 dated 22<sup>nd</sup> June, 2018 that designated magistrates of the rank of Senior Resident Magistrate to handle Employment matters of employees earning less than Kshs 80,000 came to force in June, 2018 long after this case had been filed on 3<sup>rd</sup> April, 2018.
22. In light of the foregoing, the Respondent urged this Court to reject the submission by the Applicant purporting to tax the party and party Bill of costs according to the lower court scale and instead proceed to determine the reference on merit.
23. Contrary to the submission by the Applicant, the Respondent submitted that, Rule 62A of the *Advocates (Remuneration) Order*, 1962, provides that where there is a change of advocates or more than one change of advocates, the advocate finally on record shall draw a single Bill for the whole of the matter in respect of which costs have been awarded. Therefore, that the issue of who draws a Bill of costs in a situation where more than one advocate is involved is now settled as was held in *Wycliffe Chitayi Mubalya v Dorothy Awiti Omboto t/a Dao Associates & Another* [2017] eKLR where the Court faced with a similar issue held that;

“based on provisions of paragraph 62A of the *Advocates Remuneration Order*, the taxing master erred in allowing two separate bill of costs in respect of one claim as there should be only one Bill.”
24. Accordingly, that the firm of Konosi and company advocates took over the matter from the firm of Wachira Wekhomba AIM & Associates before it was ready for hearing as such are entitled under the law to file the Bill of costs as it did in this matter.
25. On the instruction fees objected, the Respondent submitted that the Court awarded him Kshs 32,000 together with costs and interest. In that case and in line with schedule 6 of the *Advocates Remuneration Orders*, the taxing master applying her mind to the figures therein rightly awarded the Claimant instruction fees of Kshs 75,000, because such figure is awarded for award between 0-500,000, thus being that the claimant was awarded Kshs 32,000, the minimum instruction fees was Kshs 75,000.
26. On the other items objected by the applicant, the Respondent submitted that the same were drawn in accordance with the applicable *Advocates Remuneration Order*. In fact, that the applicant during hearing of the Bill of costs did not object to 33 others items which amounted to Kshs 43,140, exclusive of instructions fees.
27. In conclusion, the Respondent submitted in agreement with the Applicant that the purpose of taxation is to ensure that the party is reimburse for expenses incurred in the prosecution of the case.



He then submitted that the costs, as taxed, reflect the costs counsel expended in prosecuting this case on behalf of the Claimant and urged this Court not to interfere with it.

28. I have examined all the averments and submissions of the parties herein.
29. The applicants want the taxation by the taxing master reconsidered by this court or be referred back for taxation by another taxing master.
30. The applicants contend that the judgment having been awarded to the claimant for kshs.32,000/= plus costs, the taxing master should not have awarded costs of 200,000/= plus and therefore the taxation should be reviewed.
31. Section 62A (1) & (2) of the *Advocates Acts* provides as follows;-

“ 62A

- (1) Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.
- (2) On taxing the bill the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party taxing the bill shall not obtain indemnity for costs which he has not paid”.

32. The fact that Konosi Advocate is one that has filed for this Bill falls within the provision of the law as no other bill has been filed by any other counsel.
33. As to what the taxing master/mistress should take into consideration whilst taxing the Bill of Costs. I refer to the case of *South Ltd v Kiga & Associates* (2002) eKLR where the Court of Appeal held that;-

“The value of the subject matter for 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings any discretion by the trial judge and all other relevant circumstances”.

34. The respondents had submitted that the taxing master should have considered the subject matter from the judgment of kshs.32,000/= only.
35. However from the above Court of Appeal decision, the subject matter is considered from the items enumerated in the decision of the Court of Appeal.
36. The taxing master considered instructions fees based on the remuneration schedule and as explained in her ruling dated 15/3/2022.
37. I have not found any reason as to why I should interfere with the taxation.
38. I therefore find the application unmerited and I dismiss it with costs accordingly.

**RULING DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**



## **JUDGE**

### **In the presence of:-**

Nduta Kamau for the Applicant – present

Konosi for Respondent/Claimant - present

Court Assistant – Fred

