



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. E005 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

JANE NGETHO T/A J. W. NGETHO &

COMPANY ADVOCATES ADVOCATE.....APPLICANT

VERSUS

VIOLET MUKABI JORAM CLIENT.....RESPONDENT

RULING

1. Before this Court is the chamber summons dated 28th July 2021 by which the Applicant seeks orders that:

- i. The Applicant/Advocate is entitled to her legal fees herein as per the provisions of the Advocates' Remuneration Order of 2014.*
- ii. The Court be pleased to direct that the Respondent should pay the Applicant/Advocate her legal fees increased by 50% of the total party and party costs agreed in **ELRC Cause Number 1252 of 2014**.*
- iii. The Deputy Registrar in her impugned ruling herein, erroneously ignored and disregarded the express mandatory provisions of paragraph 57 of the Advocates' Remuneration Order 2014.*
- iv. The Court be pleased to hold that the taxing officer had no jurisdiction to tax the applicant's advocate/client bill of costs advocates bill of cost centrally to the mandatory provisions of paragraph 57 of the Advocates' Remuneration Order 2014.*
- v. The Ruling/Order/Certificate of Taxation dated 22nd June, 2021, be set aside and or quashed with costs.*

2. The application is expressed under the Advocates Act, Cap 16, Laws of Kenya paragraph 11(2), 57 thereof and all the enabling provisions of law. It is supported by the affidavit of M/S Jane Ngetho and the grounds that:

- (1) THAT the Applicant/Advocate successfully prosecuted **ELRC Cause Number 1252 of 2014**, a claim for Kshs.2,623,721.60 and the Court delivered a judgment in favour of the Respondent of a sum Kshs.1,023,658/- together with costs.*
- (2) Parties agreed that the sum be liquidated in instalments within a period of six months.*
- (3) On 19th December 2019 the parties agreed on Party and party costs of Kshs.209,978/-.*
- (4) The Applicant/Advocate had never been paid any fee by the Respondent from 2014 to 2020 when the case was concluded.*
- (5) The Applicant/Advocate notified the Respondent that her legal fee was equivalent to the costs awarded increased by one half making a total Kshs.333,864/-.*
- (6) The Respondent protested and the Applicant/Advocate filed a bill of costs for taxation by the Deputy Registrar.*
- (7) The taxing officer undertaxed the Applicant/Advocate bill of costs contrary to the provisions of the 2014 Advocates Remuneration Order.*
- (8) The Respondent made a complaint to the Law Society of Kenya against the Advocate but the same was dismissed.*

- (9) *The Respondent's claim was filed in 2014, and Advocates Remuneration Order 2014 is applicable since the cause was defended.*
- (10) *The Applicant drew and filed a bill of Kshs.547,313.87 for taxation according to the fee stipulated in the Remuneration Order.*
- (11) *The Applicant's fee should have been Kshs.333,864/- but the deputy registrar taxed it at Kshs.110,712.50 in total disregard of the Advocates Remuneration Order 2014.*
- (12) *The Court has unfettered discretion/jurisdiction, to review and/or set aside the Deputy Registrar's ruling/order/certificate of taxation and direct that the Applicant/Advocate is entitled to be paid a sum of Kshs.333,864/-.*

3. In her sworn affidavit, the Applicant/Advocate depones that the party and party costs was agreed at Kshs.209,978/- and had not received any fees from the Respondent since 2014 but retained the third instalment of Kshs.255,000/- as part of her legal fees' payment. That the Respondent was unhappy and enquired about the legal fee and the figure of Kshs.333,864/- was given. The Respondent was annoyed and insisted on Kshs.120,473/-.

4. That the deponent had already received Kshs.310,000/- as legal fees for work done and had the bill taxed.

5. The Respondent/Client filed a replying affidavit dated 23rd December 2021.

6. The Respondent depones that:

(i) *The only taxing offer legally competent to tax the bill of costs is the Deputy Registrar.*

(ii) *The consent entered into by the advocates for a bill of costs of Kshs.333,864/- was a conspiracy and collusion of advocate and the Respondent's advocate to defraud her contrary to the law.*

(iii) *All bills of costs are taxed as per the Advocates Remuneration Order 2014 unless otherwise agreed between the Advocate and the client which is not the case here but a well-orchestrated conspiracy of advocates to defeat the course of justice.*

(iv) *The bill of costs filed by the Applicant was based on the figures in the memorandum of claim as opposed to the judgment amount.*

(v) *The Applicant/Advocate took up the case after I had filed it personally and paid the Court fees.*

(vi) *The Applicant/Advocate still holds Kshs.314,000/- which she needs to deduct the taxed legal fee of Kshs.100,712.50 and refund the balance of Kshs.203,287.50.*

(vii) *The ruling/certificate of taxation dated 22nd June 2021 be upheld.*

Applicant's Submissions

7. Counsel submits that the Court should be guided by the principles espoused in **Mbogo & another v Shah [1968] EA 15** where the Court rephrased paragraph B of the Schedule VI of the Advocates Remuneration Order to lay emphasis on what is chargeable between the advocate and client.

8. The decision in **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR** is relied upon to underscore the fact that the taxing officer is obligated to exercise discretion in accordance with the law and has no other option.

9. Reliance is also made on the decisions in **Central Bank of Kenya v Makhecha & Company Advocates [2019] eKLR** as well as **D. Njogu and Company Advocates v Kenya National Capital Authority [2005] eKLR** where Ochieng J. stated inter alia –

“... Advocate/Client costs can never be less than the Party and Party costs. I say so because, it has been expressly provided that the minimum fee shall be either the prescribed fee, the fee ordered by the court or the fee agreed between the parties, increased by one-half. Furthermore, the rule expressly states that the increment is to include all proper attendances ... that although the Taxing Officers do have the discretion to either decrease or increase the instruction fees awardable in a Party and Party Bill of Costs, once he has exercised that discretion by taxing the said Party and Party Bill of Costs, the Advocate/Client costs cannot be taxed at a lesser sum.”

Respondent's Submissions

10. The Respondent identifies one issue for determination, whether the taxing officer had jurisdiction to tax the bill and **overstepped the mandate.**

11. It is submitted that the Applicant has not demonstrated how the Deputy Registrar lacks jurisdiction to tax the bill of costs being the only legally recognised taxing officer.

12. It is further submitted that the allegation that the Deputy Registrar ignored paragraph 54 of the Advocates Remuneration Order is not substantiated. That the alleged consent by the Counsels for the Claimant and Respondent in ELRC No. 1252 of 2014 was neither filed in Court nor adopted as a court order.

13. It is the Respondents submission that the Applicant did not attach a certificate of taxation and the ruling for perusal by the Court.

14. Reliance is made on the decision in **Alice Yano t/a Yano & Co. Advocates v Rebecca Nadupoi Supeyo & another [2021] eKLR** where Mwita J. stated as follows:

“It is a principle of law that a judge will not readily interfere with the decision of the taxing officer, and should only do so in very exceptional cases. The judge should only interfere where it is sufficiently demonstrated that the taxing officer erred in principle. an example is where the sum awarded is either inordinately high or low, taking into account the nature of the proceedings, to conclude that he acted on a wrong principle.”

15. The words of Spray, Acting VP of the Court of Appeal in **Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another [1972] EA 162**, are also relied upon to buttress the submission that a court of law should be slow to interfere with the award of the taxing officer.

16. Finally, reliance is made on the sentiments of Molenga JSC (Uganda) in **Bank of Uganda v Banco Arabe Espariol, Civil Application No. 29 of 2019** in support of the submission.

17. It is the Respondent’s submission that the Applicant has failed to prove that the taxing officer acted in excess of her powers and has provided no justification why the Court should interfere with the decision of the taxing officer.

18. The Respondent urges the Court to dismiss the application with costs.

Analysis and Determination

19. I have considered the application as well as the supporting and replying affidavits on record together with the submission by Counsel. The singular issue for determination is whether the Court should interfere with the exercise of discretion by the Taxing Officer.

20. The Applicant relies on paragraph B of the 6th Schedule to the Advocates Remuneration Order, 2014 which states that:

As between advocate and client the minimum fee shall be—

(a) the fees prescribed in A above, increased by 50%; or

(b) the fees ordered by the court, increased by 50%; or

(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.

21. Regrettably, the Advocates (Remuneration) (Amendment) Order 2014 has no paragraph 57. The Applicant posits that since the Respondent’s case was filed in 2014, the Advocates (Remuneration) (Amendment) Order 2014 is the applicable law in relation to Remuneration for services rendered to the Respondent. That her fees should have been Kshs.333,864/- but the taxing officer taxed it to Kshs.110,712.50.

22. In **Joreth Limited v Kigano & Associates [2002] eKLR** the Court of Appeal stated as follows:

“We would at this stage point out that the value of the subject matter of a suit for the 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

23. As regards the powers of the taxing officer, in **Macharia & Co Advocates v Magugu [2002] EA 428**, Ringera J. (as he then was) stated as follows:

“Taxation of costs, whether those costs be between party and party or between Advocate/Client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The Court will not be drawn into the arena of taxation except by way of reference from a decision on taxation, made under Rule 1 of the Advocates Remuneration Order.”

24. In **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] eKLR** the Court of Appeal stated as follows:

“The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services

rendered.”

25. Relatedly, in **Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] EA 162** the Court of Appeal stated that:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: 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.”

26. Ringera J. (as he then was) expressed similar sentiments in

First American Bank of Kenya v Shah and others [2002] E.A.L.R 64 at 69.

27. The Court is in agreement with these sentiments.

28. These principles were re-affirmed by the Court of Appeal in **Joreth Limited v Kigano and Associates (supra)**.

29. As regards powers of the Court in a reference from a taxing officer, the sentiments of the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** are instructive –

*“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 officer unless the taxing officer, erred in principle in assessing the costs ... An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see **Arthur v Nyeri Electricity Undertaking [1961] EA. 497** or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see **Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243**. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in Schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of Schedule VIA (1), that would be an error in principle. 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 ...”*

30. Finally, in **Central Bank of Kenya v Makhecha & Company Advocates (supra)** the Court of Appeal observed that:

“It seems to us quite clear that where the party and party costs have been taxed and agreed, then, unless there be an agreement as to fees between the client and the advocate, the advocate is entitled, as of right, by dint of Schedule VIB of the Remuneration Order, to the party and party costs plus half of the same. It is a matter of arithmetic, requiring no exercise of discretion on the part of the taxing officer ...”

31. Similarly, the Court of Appeal addressed the issue of costs in detail in **Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] eKLR**.

32. The Court is in agreement with these sentiments.

33. Although the Respondent submits that there was no agreement between the parties on party and party costs. No evidence was provided. Moreover, the only unsettled issue appears to be the advocate-client bill of costs. It is submitted that the taxing officer had to be guided by the Advocates Remuneration Order. The taxing officer used the Court award of Kshs.1,023,658/- to calculate “instruction fees” as provided by the scale.

34. From the principles of law cited above, it is trite that the taxing officer has jurisdiction to tax party and party costs as well as Advocate-client costs and in so doing exercises judicial discretion which courts will not normally interfere with unless the taxing officer erred in principle.

35. The Applicant/Advocate, however contends that the taxing officer taxed the Advocate/Client bill of costs in a manner inconsistent with the mandatory provisions of the Advocates Remuneration Order, 2014 and as a consequence undertaxed the bill of costs.

36. Regrettably, this contention is not substantively responded to by the Respondent.

37. As explained by the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board (supra)**, failure to comply with any of the requirements of the Order amounts to an error of principle and justifies the Court’s interference with the exercise of discretion by the taxing officer.

38. For the foregoing reasons, the Court is satisfied that the Applicant/Advocate has made a justifiable case for the Court’s interference with the exercise of discretion by the Taxing Officer, Hon. Noelle Kyany’a on the basis of error of principle.

39. In the upshot, the reference herein is allowed as follows:

(a) The taxation of bill of costs dated 22nd June 2021 is set aside and remitted for taxation by a different taxing officer.

(b) Each party to bear its own costs.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF MARCH 2022

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