



**Brook Villas Estate Limited v Gatu & another (Environment & Land Case 25 of 2016) [2024] KEELC 13330 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13330 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 25 OF 2016  
AA OMOLLO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**BROOK VILLAS ESTATE LIMITED ..... APPLICANT**

**AND**

**DUNCAN MACHARIA GATU ..... 1<sup>ST</sup> RESPONDENT**

**URIITHI CO-OPERATIVE SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the Applicant's Reference by way of Chamber Summons dated 23<sup>rd</sup> April 2024 and brought under Sections 1A, 3A and 63 of the [Civil Procedure Act](#) and Rule 11(4) of the Advocates Remuneration Order. The Applicant is seeking orders that:
  - a. The Court be pleased to vary/set aside in its entirety the Ruling delivered by Hon. T.E Marienga on 11<sup>th</sup> April 2024.
  - b. The Court be pleased to order that the 2<sup>nd</sup> Respondent's Bill of Costs be re-taxed by another Deputy Registrar of the Court.
  - c. Costs of the application be borne by the Respondent.
2. The application is based on several grounds and supported by an affidavit sworn by Muthoga Kaniaru, Chairman of the Applicant. He averred that the Hon. Deputy Registrar misdirected herself in taxing the Bill of Costs dated 5<sup>th</sup> December 2023 at Kshs.1,990,726.67. He further averred that the Hon. Deputy Registrar: arrived at an erroneous figure on the instruction and getting up fees; considered extraneous circumstances when taxing the bill; generalized the costs tied to each item without reference to the Remuneration Order; did not find that taxation relates to justifiable costs incurred during trial; and, failed to consider the Applicant's written submissions. In view of the foregoing the Applicant asked that the Bill of Costs be set aside and re-taxed.



3. The 2<sup>nd</sup> Respondent filed a replying affidavit dated 5<sup>th</sup> July 2024 and sworn by Karimi Nteere, an advocate at the firm of Maina Rogoi and Co. Advocates. It was averred that the suit was instituted by the Applicant but was eventually decided in favour of the Respondents and a decree dated 13<sup>th</sup> April 2023 issued. As costs were awarded to the Respondents, the 2<sup>nd</sup> Respondent filed its Bill of Costs dated 5<sup>th</sup> December 2023. The 2<sup>nd</sup> Respondent was seeking Kshs.2,949,145 but the Hon. Deputy Registrar awarded it Ksh.1,990,726.67.
4. The 2<sup>nd</sup> Respondent averred that the Hon. Deputy Registrar: analysed the instructions and getting up fees and gave reasons for taxing them lower; struck off items 5, 6, 9, 10, 11, 12, 24 and 31 for lack of supporting evidence; taxed items 2, 3, 4, 7, 8, 13-19, 22, 23, 25, 27, 29, 20, 33-41 as drawn as they were supported by evidence; reduced the costs on items 20, 21, 26, 28 and 32 and gave reasons for the reduction. Based on the foregoing, the 2<sup>nd</sup> Respondent submitted that the Hon. Deputy Registrar considered each item on the Bill of Costs and taxed them according the established principles of taxation.
5. In conclusion the 2<sup>nd</sup> Respondent asked the Court to dismiss the application as it is full of unsubstantiated claims.

### **Submissions**

6. The applicant filed submissions on 22<sup>nd</sup> July 2024. The first issue for determination was stated as: Whether the taxing master properly applied the principles as to taxation in taxing the bill, specifically the instruction fees. Relying on the cases of Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] KECA 587 (KLR), First American Bank of Kenya Ltd v Gulab P. Shah, Panachand Jivraj Shah & Dipack Panachand Shah [2002] KEHC 1277 (KLR) and Peter Muthoka & Joseph Mumo Kivai v Ochieng, Onyango, Kibet & Ohaga Advocates [2019] KECA 597 (KLR) the Applicant submitted that as per Schedule 6 of the Advocates Remuneration Order, the instruction fees should be calculated in accordance with the value of the subject matter which in this case was 40% of the purchase price paid by the Plaintiff which amounted to Kshs.33,600,000. It was further submitted that the instruction fees derived based on the unpleaded sum of Kshs.84,000,000 was an error of principle and therefore unjustified.
7. The Applicant also averred that there were no complex nor novel legal issues raised in the suit before the Court. There was therefore no justification for the enormous fees awarded to the 2<sup>nd</sup> Respondent as instruction fees. With regards to the getting up fees, the Applicant relied on Schedule 6 of the Advocates Remuneration Order to argue that having established that the instruction fees were erroneously calculated, it follows that the get up fees are also erroneous and should be recalculated at one third of the correct instruction fees.
8. It was submitted that item 4 which was listed as ‘drafting of Replying Affidavit to the Amended Notice of Motion dated 12/8/2016’ was erroneous as the 2<sup>nd</sup> Respondent never participated in the impugned application nor filed a response. With regards to item 7, it was submitted that the Kshs.4,250 was erroneous as it made reference to 25 folios while there were only five folios which would costs Kshs.1,250. With regards to item 8 it was submitted that the Kshs.1,135 charged for requesting a court order was not supported by any evidence. It was further submitted that items 14, 15, 16, 17, 18, 19, 20 and 21 were erroneously charged as perusal of pleadings which had been charged in the instruction fees.
9. The second issue for determination was stated as: Whether the bill of costs should be remitted for re-taxation. It was submitted that based on the foregoing, it has been established that the taxation ruling



was erroneous and out of principle. It should therefore be set aside and the 2<sup>nd</sup> Respondent's bill of costs placed before another taxing master.

### **Analysis and Determination**

**Based on the foregoing, the following issue arises for determination:**

#### **Whether the Ruling Delivered by Hon. T.E Marienga on 11<sup>th</sup> April 2024 should be set aside**

10. The Applicant has averred that the ruling should be set aside for several reasons: one that the instructions and get up fees were erroneously charged; two that some items were overcharged; and, three that some items were charged twice. The 2<sup>nd</sup> Respondent averred that the bill of costs was properly taxed.
11. The law about interfering with the decision of a taxing officer was stated as follows in the case of *First American Bank of Kenya Ltd v Gulab P. Shah, Panachand Jivraj Shah & Dipack Panachand Shah* [2002] KEHC 1277 (KLR):

I have considered the above submissions. 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. (See *Steel & Petroleum (e.a) Ltd Vs. Uganda Sugar Factory* (Supra). Of course. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state 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. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment.

12. Elsewhere in the case of *Kibatia & Company Advocates v China Jiangsu International* [2024] KEHC 2300 (KLR) the Court stated as follows:

Before interfering with the taxing master's decision, the court should evaluate if the taxing officer rightly exercised her discretion in taxing of the instruction fees. To my mind, the amount taxed by the taxing officer ought to be commensurate to the work done, and no advocate ought to unjustly enrich themselves.

It was held in *Moronge & Company Advocates v Kenya Airports Authority* [2014] eKLR that;

“...The advocate's pay however must be commensurate to his work otherwise it shall be what is termed as “unjust enrichment”. The same must be a reasonable compensation for professional work done. The court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances...”



.... In the above cited case, it was further held that the court will only interfere with the discretion of the taxing master if it was satisfied that the taxing master applied a wrong principle or the discretion was wrongly applied.

13. The import of the foregoing is that a taxing officer's decision can only be interfered with if there is a proven error in principle or the amounts awarded have been grossly undervalued or overvalued. In the instant application the Applicant has averred that the Hon. Deputy Registrar erred in principle by considering the purchase price of Kshs.84,000,000 as the price of the subject matter instead of considering it as Kshs.33,600,000 which is the partial purchase price that the Applicant had paid.
14. I have perused the ruling by the Hon. Deputy Registrar and other documents on record. The Applicant was seeking specific performance orders for property that was valued at Kshs.84,000,000. It was not seeking a refund of the partial purchase price that it had already paid. The Hon. Deputy Registrar therefore rightfully identified Kshs.84,000,000 as the value of the subject matter. Additionally, having perused the formula set out in Schedule 6 Item 1(b) of the Advocate's Remuneration Order, I am of the view that the Hon. Deputy Registrar rightfully arrived at the Kshs.1,460,000 instruction fees. It also follows that the get up fees which according to Schedule 6 Item 2 of the Advocate's Remuneration Order should be no less than one third of the instruction fees was rightfully awarded as Kshs.486,666.67.
15. The Applicant also averred that the matter was not complex as to warrant the high instruction fees. This claim is unfounded as the Hon. Deputy Registrar only awarded costs based on the instruction fees. No additional costs were awarded based on the complexity of the matter. The Hon. Deputy Registrar stated as follows in her ruling:

I have carefully considered the factual and legal issues with a view to gauge complexity of issues, importance of the matter, the amount involved, perusal of entire paper work, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter. I find that the responsibility entrusted to the 2<sup>nd</sup> Defendant's counsel was quite ordinary and called for nothing but normal diligence such as must attend the work of a professional in any field.

16. The claim that the ruling should be set aside on account of an error in calculating the instruction fees and get up fees therefore fails.
17. The Applicant has averred that the 2<sup>nd</sup> Respondent did not participate in the application dated 12<sup>th</sup> August 2016. In the submissions relating to the bill of costs, the 2<sup>nd</sup> Respondent clarified that it was a typographical error as the correct date was 12<sup>th</sup> October 2016. The impugned affidavit was then filed on 13<sup>th</sup> December 2016. The Applicant's claim about item 4 therefore fails.
18. With regards to item 7, the format of the document as filed makes it impossible for the Court to determine the number of folios. However, on a balance of probabilities it is more likely that there are 25 folios than 5 folios when you consider the size and spacing of the font on the impugned document. The Applicant's claim about item 7 therefore fails.
19. For the avoidance of doubt, Section 17 of the Advocates Remuneration Order defines a folio as:

A folio shall for all purposes of this Order be deemed to consist of 100 words and any part of a folio shall be charged as one folio. A sum or quantity of one denomination stated in figures is to be counted as one word: eg. "£25,564 16s 8d." is to be counted as three words, and "254 feet 11 inches" is to be counted as four words.



20. With regards to item 8, the existence or lack thereof of the same cannot be ascertained at this point. However, in consideration of the other amounts taxed in the bill of costs, the amount set out under item 8 is too negligible to anchor a setting aside of the ruling.
21. The Applicant has also called into question the fees charged for perusal under items 14 - 21. The Hon. Deputy Registrar noted that the items were supported by the Court file. In the absence of an error in principle relating to those items, there is no justifiable reason to interfere with her decision. The Applicant's claim concerning items 14-21 therefore fails.
22. In view of the foregoing, the Applicant has failed to prove on a balance of probabilities that the ruling should be set aside. The reference is hereby dismissed with costs to the 2<sup>nd</sup> Respondent.

**RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOV. 2024.**

**A. OMOLLO**

**JUDGE**

