



**Daniel & Kenneth Advocates LLP v Daniel Orenge & Company (Environmental and Land Originating Summons E032 of 2022) [2024] KEELC 7514 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7514 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E032 OF 2022  
JA MOGENI, J  
NOVEMBER 13, 2024**

**BETWEEN**

**DANIEL & KENNETH ADVOCATES LLP ..... APPLICANT**

**AND**

**DANIEL ORENGE & COMPANY ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 15/05/2024 brought under Rule 11 of the Advocates Remuneration Order, Section 1A, 1B, 3A Section 79 (G) of the [Civil Procedure Act](#) and Order 21 Rule 9A of the Civil Procedure Rules, 2020 the Applicant seeks the following orders: -
  - a. That this Honorable Court be pleased to stay execution for costs arising from the ruling on taxation by Hon. Judith Omollo, Deputy Registrar delivered on 14<sup>th</sup> May 2024 in ELC No. E032 of 2022 (O.S) pending the hearing and determination of this Reference
  - b. That the decision of the Taxing Officer, Hon. Judith Omollo, Deputy Registrar in the ruling delivered on 14<sup>th</sup> May 2024 in ELC No. E032 of 2022 (O.S) with respect to items 1 and 2 in the Bill of Costs, be set aside and taxed afresh.
  - c. That in the alternative, this Honorable Court be pleased to order that the Respondent's Bill of Costs with respect to items 1 and 2 be taxed afresh by another taxing officer
  - d. That this Honorable Court be pleased to give orders or directions hereof that it may deem fit to give hereof.
  - e. That the costs of this Application be in the cause
2. The said application was supported by the grounds on its face and the supporting Affidavit, sworn by Daniel Orenge, on the 15/05/2024.



3. The application was opposed by the Respondents vide a Replying Affidavit sworn by Daniel Muriithi Muriungi Managing Partner in the Respondent Company dated 5/06/2024. In the said response, the Respondent stated that there is no proper reference before the court since it needs to have been filed in a separate Miscellaneous File as per Rule 11 of the Advocates Remuneration Order (ARO). Further that whereas the Applicant invoked Section 79 (G) of the *Civil Procedure Act* which addresses the issue of timeliness of filing an Appeal the Application is not about the Appeal.
4. The Respondent stated that the objection raised has also not addressed the specific items but that it focuses on the entire ruling of the taxing officer and that the court cannot stay execution of costs in the manner the Applicant has approached court and that a certificate of costs is deemed as final unless set aside.
5. The Respondent further stated that the Applicant had not shown or established any evidence of prejudice that they will suffer and thus the application is an abuse of the court's process and that this application is purely a delay tactic devoid of merit preventing the Respondent from enjoying fruits of the judgment.
6. Further that taxing officer granted the parties time to comprehensively submit which they did and the respondent justified the amount in the now impugned items 1 and 2. Thus that the court cannot merely interfere with the decision just because an award is high or too low unless the applicant demonstrated so based on an error of principle or that the fee awarded is excess and in the present application the applicant has merely alleged that the decision was excessive and outrageous without proof.
7. It is the respondent's averment that the bill of costs was drawn to scale for items 1 and 2 and taxing officer did apply their discretion and considered that the pleadings and judgment clearly spelt out the subject matter and value.
8. The Application came up for hearing on 19/06/2024 whereupon the Court directed that the same be canvassed by way of written submissions. At the time of writing this ruling none of the parties had filed any submission.

### **Analysis and Determination**

9. The issue for determination is whether the taxing master exercised her discretion judiciously in determining the instruction fee and whether she applied the right principles in arriving at her decision.
10. It is settled law that a court cannot interfere with the taxing master's decision on taxation unless it is shown that either the decision was based on an error of principle, or the sums awarded are manifestly high or low as to lead to an injustice. See *First American Bank of Kenya vs Shah and others* (2002) EA 64, *Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited and another* (1972) E.A 162. These principles were re-affirmed by the Court of Appeal in *Joreth Limited vs. Kigano and Associates* (2002) 1 E A 92.
11. Instruction fees should be based on the value of the subject matter in dispute as determined from the pleadings, judgment or settlement. The Court of Appeal stated in *Eastland Hotel Limited v Wafula Simiyu & Co. Advocates* [2014] eKLR as follows:

This Court's decision in *Joreth Limited v Kigano & Associates* (supra) which was cited to us by both the appellant and the respondent, states 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. But where the same is not ascertainable from either the pleadings, judgment



or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.

Was the taxing officer able to determine the value of the subject matter from the “pleadings” on record? What are “pleadings”? Under Section 2 of the *Civil Procedure Act*, pleading includes:

“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

An affidavit is not a pleading, it is evidence.

12. The dispute in this matter involved purchase of the parcel of land known as LR No. 1/1381 (IR. 200711)(Original No. 1/835). The subject matter of the dispute is the purchase price of Kshs 21,500,000 which was deposited with the applicant who had given a professional undertaking dated 21/12/2021 but when the respondent rescinded the sale agreement and recalled the said deposit the applicant had released the deposit to the vendor’s directors. This necessitated filing of ELC E059 of 2022 where the court ordered that the applicant refund the said deposit to the respondents.
13. Thus the deposit paid for the value of the said parcel of land will therefore be the basis of determination of instruction fees despite there being a difference of 3 years from the time the money was deposited. At the time the suit was filed and instructions were taken to prosecute or defend it some two or so years had lapsed since the agreement was entered into.
14. In *Joreth Limited vs. Kigano and Associates* (Supra) the Court of Appeal stated that where the value of the subject matter cannot be discerned from the pleadings or judgment, the taxing master has discretion to assess it 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. That is what CK Njai Esq did when he said: ‘As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.’”

15. In this case, the taxing master exercised her discretion in assessing instruction fees and took into consideration the value of the subject matter. A court will not interfere with the award of a taxing officer solely on quantum. See *Ouma vs. Warega* (1982) KLR 288 . In *Premchand Raichand Limited*



& another vs. Quarry Services of East Africa Limited and another (1972) E.A 162, the court stated as follows:-

“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”.

16. The general principles governing interference with the exercise of the taxing master’s discretion are well settled as was held in the South African Case of Visser vs Gubb 1981 (3) SA 753 (C) 754H – 755C. The court stated as follows:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

17. Similarly, in the case of Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR (supra) the Court observed that

“On 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.”

18. The taxing master must be guided by the principles governing taxation as was held in the leading case of Premchand Raichand Ltd Another -vs- Quarry services of East Africa Ltd and Another(supra). The principles laid out are: “

- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
- ii. The taxing master was expected to tax each bill on its merits;
- iii. The value of the subject matter had to be taken into account;
- iv. The taxing master’s discretion was to be exercised judicially and not whimsically or capriciously;
- v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
- vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected



himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.”

19. The applicant faulted the taxing master for coming up with an excessive figure for items 1 and 2 of the Bill of Costs. It is expected that a taxing master is under a duty to consider the instruction fee which should cover the advocates work including taking instructions and preparing the case for trial or appeal, the value of the subject matter and that the taxing master’s discretion must be exercised judicially and not whimsically or capriciously.
20. From my perusal of the record and the pleadings filed, I notice that the taxing master applied the principles governing taxation by considering the value of the subject matter and the judgment issued in this matter.
21. I note that the respondent counsel had averred that the applicant did not file the application under the correct provision of the law and also relied on Section 79 (G) which is provision that deals with appeal and extension of time. This be as it may I chose not to dwell on technicality as implored under Article 159 (2) so that I could focus on substantive justice and therefore I will not belabor the point on technical issues.
22. At the same time the applicant had sought for stay of execution for costs arising from the ruling.
23. Taxation of costs is part and parcel of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Section 94 of the [Civil Procedure Act](#) provides, as a general rule, that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs. The said section stipulates as follows: -
  - “ 94. Execution of decree of High Court before costs ascertained. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”
24. At the same time, Section 89 of the [Civil Procedure Act](#) provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. Section 89 of the Act provides as follows: -
  - “ 89. Miscellaneous proceedings  
The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”
25. My humble view is that the provisions of the Civil Procedure with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates’ Remuneration Order. This position is in line with the principle of natural justice that a party against whom substantial sums of money has been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination.
26. But it is important to note that the for the stay of execution to be granted, the conditions to be met in an application for stay of execution pending hearing and determination of a reference to a judge



from taxation of costs are similar to the conditions for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. This is to say that a court will in granting the orders be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant. The court will also consider if the application has been filed without unreasonable delay.

27. On whether the application was filed without unreasonable delay, I noted that the taxing master's ruling was delivered on 14/05/2024 and this application was filed on 15/05/2024 thus there was no unreasonable delay.
28. On substantial loss, I note that the taxed amount in dispute is over Kshs. 787,273 which the applicant has not shown the court how substantial it is. The applicant only made an application seeking to have it set aside and being referred to fresh taxation. There is no explanation on how substantial it is and in comparison with what for it to be considered substantial. I have here above addressed the issue of value and the judgment. I am therefore unable to make a finding about the substantial amount.
29. The applicant is aware that for this court to issue an order of stay of execution the third principle is that the applicant has to provide security for due performance of the decree or any such order which may be issued by the court. The applicant did not provide any condition for security or any security for that matter. Now it follows that the conditions for grant of stay were not met since all the three must be met for the stay to be granted.
30. Thus I have not found any evidence that the taxing master exercised her discretion capriciously or whimsically. In my view, it would be unjust to interfere with the discretion of the taxing master. Given the foregoing I dismiss the application with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF NOVEMBER 2024.**

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**MOGENI J**

**JUDGE**

In the Virtual presence of:

Mr. Githinji for Decree holder/Respondent

No appearance for applicant

Caroline Sagina - Court Assistant

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**MOGENI J**

**JUDGE**

