



**Kiplenge & Kurgat Advocates v Raiply Woods (K) Limited (Environment and Land Miscellaneous Application E010 of 2023) [2024] KEELC 14053 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14053 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2023  
JM ONYANGO, J  
DECEMBER 17, 2024**

**BETWEEN**

**KIPLENGE & KURGAT ADVOCATES ..... APPLICANT**

**AND**

**RAIPLY WOODS (K) LIMITED ..... RESPONDENT**

**RULING**

1. By a Chamber Summons dated 1<sup>st</sup> March, 2024, brought pursuant to the provisions of paragraph 11(2) and (4) of the Advocates (Remuneration) Order 2014; the Applicant sought the following orders: -
  - a. That the decision of the taxing master Hon. B.K. Kiptoo delivered on 23<sup>rd</sup> February, 2024 on the Bill of Costs dated 11<sup>th</sup> September, 2023 with respect to Items 1, 2, 50 and 51 be set aside and taxed afresh by this Honourable Court.
  - b. That costs of this Application be provided for and borne by the Respondent;
2. The application is based on 9 grounds on the face thereof and supported by the affidavit of Mutai K. Owen, an Advocate of the High Court practicing under the name and style of Kiplenge and Kurgat Advocates, the Applicant herein. He deposed that the Applicant was retained to represent the petitioners in Eldoret Petition No. 9 of 2014, in a dispute relating to ownership of land. The said suit was heard and determined vide a judgment delivered on 8<sup>th</sup> May, 2019 by Hon. A. Ombwayo. The court held that the Petitioner's Constitutional right to property had been violated an award of Kshs.1,060,000,000/= to the Petitioners as compensation.
3. After the said judgment, the Applicant firm prepared and filed an Advocate- Client Bill of Costs dated 11<sup>th</sup> September, 2023 which was taxed and a ruling delivered on 23<sup>rd</sup> February, 2024. The Applicant being aggrieved by the said ruling lodged a Notice of Objection dated 29<sup>th</sup> February, 2024.



4. It is his contention that the Taxing Master erred in fact and principle in taxing Item 1 “Instruction fee” by finding that the value of the subject matter could not be ascertained. He maintained that the suit land was valued during the course of the proceedings and was correctly captured at paragraph 119 of the judgment as Kshs.1,710,000,000/= and at paragraph 125 as Kshs.820,000,000/= pursuant to a contrary valuation report. That based on the two valuation reports; the trial court made an award of Kshs.1,060,000,000/=.
5. He further averred that the Taxing Master failed to tax Item 2 “Getting-up fees” appropriately by confusing the same with Item 51 which called for a 50% increase in view of the fact that this was an Advocate-Client Bill of Costs. He contended that if the decision on instructions fees is varied, it follows that the fees charged under Item 2 must be adjusted accordingly to  $\frac{1}{3}$  of the instructions fees.
6. He maintained that this court is vested with the requisite jurisdiction and powers to exercise its discretion by setting aside, reviewing and/or varying the decision of the taxing master in respect to items 1, 2, 50 and 51 in the interest of justice. He added that no prejudice will be caused to the respondent if the orders sought are granted and urged the court to grant the orders sought.
7. The application was opposed. Mr. Kibe Mungai, an Advocate of the High Court of Kenya practicing in the name and style of M/S Kinoti & Kibe Company Advocates, who swore a Replying Affidavit dated 14<sup>th</sup> October, 2024. He conceded that the Applicant firm was retained to represent the Respondent in Eldoret ELC Petition No. 9 of 2014 and that the matter was heard and determined vide a judgment delivered on 8<sup>th</sup> May, 2019 by Hon. Justice A. Ombwayo whose effect was to award the petitioners Kshs.1,060,000,000/=
8. He further deposed that aggrieved by the said award two appeals were lodged at the Kisumu Court of Appeal No. 159 of 2019 and 254 of 2019. The two appeals were consolidated, heard and determined vide a judgment delivered on the 22<sup>nd</sup> July, 2022, whose effect was to uphold the decision of the trial court.
9. An appeal to the Supreme Court of Kenya was subsequently lodged vide Supreme Court Petition No. E021 of 2022. The same was heard and determined vide a judgment dated 2<sup>nd</sup> August, 2024 and whose effect was to set aside the decision of the Court of Appeal of 22<sup>nd</sup> July, 2022.
10. It is his claim that the proceedings before the trial court were of the nature of a constitutional petition notwithstanding that a prayer for compensation was sought and granted. Thus, the computation of the impugned compensation value in the judgment cannot be used as the value of the subject matter. Moreover, that the effect of the Supreme Court judgment was to set aside the decision of the Court of Appeal and the figure of Kshs.1,060,000,000/= is consequently untenable.
11. He dismissed the allegations by the Applicant that the Taxing Master erred in principle in arriving at his decision and maintained that the Taxing Master correctly held that the subject matter of the suit was for constitutional and prerogative orders and not a liquidated claim. The Taxing Master was therefore right in applying the provisions of paragraph 1 (j) (ii) of the Advocates (Remuneration) (Amendment) Order, 2014.
12. It was his contention that the Applicant had not shown that there was a misdirection on some matter resulting in a wrong decision by the Taxing Master neither was it manifest from the case that the Taxing Master improperly exercised his discretion resulting in injustice. He urged the court not to interfere with the decision of the Taxing Master.
13. The Application was canvassed by way of written submissions; both parties filed their rival submissions together with authorities which I have read and considered in arriving at my decision.



## Analysis and Determination

14. It is now well settled that a court will only interfere with the decision of the Taxing Officer where it is manifest and clear that the decision of the Taxing Officer was based on an error in principle or the fee awarded was excessive so as to justify the interference. See *First American Bank of Kenya v Shah & others* [2002] E.A.L.R. 64
15. The Applicant herein has sought the setting aside, vacating and/or varying of the decision of the Taxing Master delivered on the 23<sup>rd</sup> February, 2024 and whose effect was to tax the Advocate Client Bill of Costs at Kshs.5,314,800/= in terms of Items 1,2,50 and 51 and that the same to be taxed afresh. The Applicant's main contention is that the Taxing Master erred in finding that the value of the subject matter was/is not ascertainable. He contends that the value of the subject matter is clear from the proceedings as adduced by the valuation reports and from the judgment.
16. The Respondent dismissed the said allegations and maintained that the Taxing Master exercised his discretion judiciously and properly that the claim before the trial court was not for a liquidated sum but rather, a constitutional claim and prerogative orders.
17. The main issue for determination is whether the Taxing Master erred in principle in arriving at his decision rendered on the 23<sup>rd</sup> February, 2024 and whether the instant application is merited. I will proceed to address the same on account of the 4 Items raised by the Applicant as hereunder;

### Item 1- Instructions Fees

18. The main issue in dispute is whether the value of the subject matter was ascertainable or not. It was the finding of the taxing master that the same could not be ascertained, which position was reiterated by the Respondent. The Applicant on the other hand maintained that the same could be ascertained and he relied on the judgment of the trial court; particularly on the compensation award issued of Kshs.1,060,000,000/- and the 2 valuation reports produced by the parties.
19. The provision governing taxation of costs in constitutional matters is Schedule 6 Paragraph 1 (j) (ii) of the Advocates Remuneration Order, 2014 which provides as follows: -
  - j. Constitutional petitions and prerogative orders;  
To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—
    - i. where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
    - ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000
    - iii. to present or oppose application for setting aside arbitral award
20. The Court in the case of *Violet Ombaka Otieno & 12 Others vs Moi University* [2021] eKLR while discussing the assessment of instruction fees in a constitutional petition, relied on the provisions of Paragraph 1 (j) (ii) of the Advocates Remuneration Order and held as follows: -



24. 24. A reading of the provision clearly shows that the Remuneration Order specifically provides the instruction fees for constitutional petitions and applications for prerogative orders. In light of that express provision, the taxing officer was correct in relying on Paragraph 1(j)(ii) of Schedule 6 as the matter before her was a defended constitutional petition and Kshs. 100,000 is the provided minimum instruction fees. The instruction fees can however be increased based on the factors specified therein.
25. In my view, even where damages have been awarded in a defended constitutional petition, there is no room to fall back on the provisions of Sub-paragraph 1(b) because Paragraph 1(j) is clear that one of the factors to be considered in determining the instruction fees is the amount or value of the subject matter. The taxing officer can only use Sub-paragraph 1(b) as a guide as to the awardable instruction fees for the given amount or value of the subject matter. In my view, any damages awarded in a constitutional petition is one of the factors to be taken into account by a taxing officer when assessing the instruction fees payable.”
21. The question that therefore follows is what was the value of the subject matter and/or whether the same was not ascertainable. The court in the case of *Joreth Limited v Kigano & Associates Advocates* [2002] EA 92 opined as follows:
1. “the value of the subject matter of a suit 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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 relevant circumstances.”
22. I have carefully considered the arguments made by the Applicant vis a vis the judgment of the trial court. While the Applicant maintains that the value of the subject matter was ascertainable from the pleadings based on the two valuation reports filed as well as the compensation award issued by the trial court, the judgment of Hon. Justice A. Ombwayo dated 15<sup>th</sup> May, 2019 does not clearly state the value of the property.
23. Paragraphs 119 and 125 of the trial judgment outlines the various figures in the rival Valuation Reports filed by the parties. In paragraph 126 the learned judge aptly stated in part as follows, and which I seek to reproduce verbatim: -
- “I have considered the two valuation reports and do find both values did not do a comparative valuation of the adjacent plots and further no sale agreements of the neighboring plots was availed to the valuers. However, I do find evidence that the property is prime within the municipality of Eldoret and along Uganda road and therefore Kshs.1,060,000,000/= is a commensurate compensation to the petitioners for loss of their land through an unprocedural scheme...”
24. Thus, I do not quite agree with the position taken by the applicant herein that the compensation award of Kshs.1,060,000,000/= issued by the trial court amounts to the value of the subject matter.
25. In the premises, I accordingly find that the value of the subject matter was not ascertainable. Both parties filed their rival valuation reports, which the trial judge faulted for not being an accurate measure of the value of the subject matter. The Applicant cannot therefore be seen to rely on the valuation report in his favor and disregard the valuation report that was produced by the Respondent.



26. Consequently, this court finds that the claim was a constitutional petition claim and the Taxing Master therefore properly and sufficiently considered the parameters set out under paragraph 1(j) of Schedule 6, the compensation award issued by the trial court notwithstanding. I therefore find no reason to interfere with item 1 on instruction fees.

### **Item 2 – Getting Up Fees**

27. The Applicant contends the Taxing Master failed to tax Item 2 on “Getting-up fees” appropriately by confusing the same with Item 51 which called for a 50% increase in view of the fact that this was an Advocate-Client Bill of Costs. The Respondent on the other hand maintained that the Taxing Officer considered this item alongside item 50 and increased the assessed instruction fees by ½ as per Schedule IV Paragraph B of the Advocates Remuneration Order, 2014.

28. The law on the assessment of getting up fees is Schedule 6, Paragraph 2(i) of the Advocates Remuneration Order, 2014 and which provides as follows: -

2. Fees for getting up or preparing for trial

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that— (i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

29. This court has taken the liberty to keenly look at the impugned ruling of the taxing master issued on the 23<sup>rd</sup> February, 2024 and on Item 2 on Getting-up fees, it is important to note that the Taxing Master pointed out that the bill being an Advocate – Client Bill of Costs, he would increase the item by ½ as per schedule VI paragraph B of the Advocates Remuneration Order, 2014.

30. Paragraph 2(i) of Schedule 6 above is clear that the fee/amount to be assessed for getting up and preparing for trial shall not be less than one-third (1/3) of the instruction fees allowed. This fee/amount in my view is completely different and separate from the 50% increase allowed in an Advocate- Client Bill of Costs as provided under schedule VI paragraph B of the Advocates Remuneration Order, 2014.

31. In view of the foregoing, this court finds that the Taxing Master erred in consolidating and assessing Item 2 and 51 as the same. There was therefore an error in principle with regard to Item 2.

### **Item 51 - Increase by 50% of Advocate Client Bill of Costs.**

32. The Applicants argues that the Taxing Master erred by consolidating Item 2 and 51 as one and increasing the same by 50% instead of taxing item 2 separately and increasing the same by one- third.

33. As already discussed hereinabove; Item 2 and 51 are significantly different and the same ought to have been taxed separately. Schedule VI paragraph B of the Advocates Remuneration Order, 2014 provides for an 50% increase in an Advocate – Client Bill of costs.

34. There is no dispute that the taxing master rightfully increased the assessed amount on instruction fees by 50%. However, I wish to point out that from the ruling, the increase was solely limited to the instruction fees which was taxed at Kshs.3,000,000/- and which was increased by 50% to amount to Kshs.1,500,000/-



35. Schedule VI paragraph B of the Advocates Remuneration Order, 2014 is clear in this regard and states as follows: -

“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.

36. From a perusal of the ruling delivered on 23<sup>rd</sup> February, 2024 it is evident that the 50% increase provided under part B of the Schedule 6, did not take into account the other amounts as assessed/taxed and which included the getting up fees, drawings, attendances among others as provided under part A of the same schedule.

37. It is therefore my finding that Item 51 was not taxed to scale and the taxing master erred in his finding under this item. Further, having held that Item 2 ought to have been separately assessed and taxed, it follows that the amount under Item 51 will have to be adjusted accordingly

#### **Item 50 - VAT**

38. It is the Applicant's claim that the VAT is chargeable on the entire amount assessed and taxed as costs with the exception of disbursements. He contends that the taxing master erred in principle by charging/assessing VAT only on the Items 1 and 2

39. It is not in dispute that VAT is duly chargeable on the services rendered by an Advocate to his client and is therefore applicable in an Advocate – Client Bill of Costs.

40. From the impugned ruling, it is evident that VAT was charged on items 1 and 2 at Kshs.720,000/=. The same did not factor in the other taxed amounts and to this end, I agree with the Applicant.

41. Further, having found that items 2 and 51 ought to be charged separately, it automatically follows that the amount chargeable as VAT will also be adjusted accordingly. I find the objection on this item as being merit.

#### **Conclusion**

42. In the upshot, this court finds that the Chamber Summons Application dated 1<sup>st</sup> March, 2024 is merited and the decision of the Taxing Master issued on the 23<sup>rd</sup> February, 2024 is hereby set aside in terms of Items 2, 50 and 51 only.

43. I hereby direct that the Bill of Costs dated 11<sup>th</sup> September, 2023 be remitted to a different Taxing Master, for purposes of fresh taxation in respect to Items 2, 50 and 51 only.

44. The costs of the application shall be borne by the Respondent.

**DATED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024.**

.....

**J. ONYANGO**

**JUDGE**



In the presence of;

Mr. Mutai for the Applicant

Mr. Mwathe for the Respondent

Court Assistant: Brian

