



**Mwangi Njenga & Company Advocates v Shiva Enterprises Limited (Environment and Land Miscellaneous Application 41A of 2020) [2023] KEELC 192 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 192 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 41A OF 2020  
NA MATHEKA, J  
JANUARY 26, 2023  
FORMERLY HCCC MISC APPLICATION NO E067 OF 2020**

**BETWEEN**

**MWANGI NJENGA & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**SHIVA ENTERPRISES LIMITED ..... RESPONDENT**

**RULING**

1. The Application is dated 23rd May 2022 and is brought under Section IA, 1B, & 3A of the [Civil Procedure Act](#) and Rule 11(1) & (2) of the Advocates(Remuneration) Order seeking the following orders;
  1. That leave be granted to the Applicant to file the reference against the ruling of Hon. J. M. Nyariki delivered on 15<sup>th</sup> September 2021.;
  2. That the taxation ruling dated 15<sup>th</sup> September 2021 delivered in High Court Miscellaneous Civil Application No. E067 of 2020 be set aside and/or varied.
  3. That the bill of costs dated 17<sup>th</sup> November 2020 be taxed afresh before another taxing officer.
  4. That the costs of the application be provided for.
2. It is founded on the following grounds that the Taxing Master erred when he held that there exists a consent order issued in the primary suit (Msa HCC 101 of 2008) on 13<sup>th</sup> February 2017 requiring the Respondent to pay the Applicant Kshs.1,000,000/= as costs of the suit. { The Taxing Master erred in finding that the consent order dated 13<sup>th</sup> February 2017 constituted an agreement for legal fees between the Applicant and the Respondent. The Taxing Master erred in failing to find that the consent order dated 13<sup>th</sup> February 2017 ordered payment of party and party costs as negotiated and agreed upon between the parties in the primary suit and did not preclude the Applicant from recovering legal



fees against the Respondent in the event the party and party costs negotiated by the parties in the primary suit was not sufficient to defray the Applicant's advocate and client costs under the Advocates (Remuneration) Order or any fee agreement between the Applicant and Respondent. The Taxing Master erred in conflating the role of the Applicant as an advocate acting as an agent and on the instructions of the Respondent in the primary suit with that of a party in the suit.

3. The Taxing Master erred in finding that the bank transfer made on 29<sup>th</sup> November 2018 for the sum of Kshs. 2,718,200 was in settlement of the fees in the primary suit. The Taxing Master erred in failing to consider the evidence of the Applicant, particularly the evidence supporting the contention that the bank transfer of 29<sup>th</sup> November 2018 was in settlement of fees in another suit, of 2014. Being aggrieved with the learned Deputy Registrar's taxation ruling, the Applicant issued a letter dated 29<sup>th</sup> September 2021 giving notice of objection to the said taxation ruling and a further reminder letter dated 26<sup>th</sup> October 2021. The learned Deputy Registrar has not responded to the notice of objection and the reminder letter.
4. This court has considered the application and the submissions therein. I find that indeed the Applicant herein filed an objection/reference in court as required under rule 11 (2) of the Advocates (Remuneration) Order on 29<sup>th</sup> September 2021 seeking an explanation as to why the Taxing Master had taxed bill of costs as they had. That the same were never given and he filed this reference. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:
  - "(1). Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.
  - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."
5. Be that as it may, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of *First American Bank of Kenya vs Shah and Others* (2002) EA 64 and *Joreth Ltd vs Kigano and Associates* (2002) 1 EA 92, that the Taxing Master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law. In *First American Bank of Kenya vs Shah and Others* (2002) E.A.L.R 64 the court held that;

"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".
6. These principles reiterate the position of the Court of Appeal in *Joreth Ltd vs Kigano & Associates* (2002) eKLR, where the said Court held that a Taxing Master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the Taxing Master is excessive to amount to an error in principle.
7. The Applicant in the instant application contends that being dissatisfied with the Taxing Officer's decision, issued a notice of objection. The Applicant states that the Taxing Master erred when he held



that there exists a consent order issued in the primary suit (Msa HCC 101 of 2008) on 13<sup>th</sup> February 2017 requiring the Respondent to pay the Applicant Kshs.1,000,000/= as costs of the suit.

8. In *Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna* (2006) eKLR Ojwang, J (as he then was) expressed himself 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, 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...The 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 manifestly excessive as to justify an inference that it was based on an error of principle. 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 case 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 reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs..."

9. I have perused the court record and find that indeed the Applicant herein filed an objection/reference in court as required under rule 11 (2) of the Advocates (Remuneration) Order seeking an explanation as to why the Taxing Master had taxed bill of costs as they had. That the same were never given and he filed this reference. To date the reasons have never been given and the court will rely on the Taxing Master's ruling. In the case of *Evans Thiga Gaturu vs Kenya Commercial Bank Limited* (2012) eKLR the court held as follows:

That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First and foremost, the above provision presupposes that in delivering their decisions on taxation, the Taxing Officer only pronounce the results of the taxation without the reasons behind them. In most cases the court is aware that taxing officers in



their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances it would be foolhardy to expect the Taxing Officer to redraft another “ruling” containing the reasons. In my view this is another provision that requires to be looked into afresh. I do not see the reasons why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefor. In my view there is no magic in requiring the Taxing Officer to furnish reasons before the making of a reference.”

10. In the instant case the Taxing Master found that where parties have entered a prior agreement with regard to legal fees such agreement unless controverted by another agreement between the parties shall be binding upon both parties. I have perused the said consent entered in court on the 13<sup>th</sup> February 2017 and paragraph 2 states that;

That the Defendants Advocates to wit Mwangi Njenga & Company Advocates be paid a sum of Kshs. 1 million as costs of the case.”

11. I find that the consent is clear and there is no error by the Taxing Officer in the assessment. Consequently, I find that the application is not merited and I dismiss it with no orders as to costs as it was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JANUARY 2023.**

**N.A. MATHEKA**

**JUDGE**

