



Tom Ojienda & Associates Advcoates v County Government of Nairobi (Miscellaneous Application E789 of 2021) [2025] KEHC 715 (KLR) (Commercial and Tax) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E789 OF 2021
BM MUSYOKI, J
JANUARY 31, 2025**

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES ADVCOATES APPLICANT

AND

THE COUNTY GOVERNMENT OF NAIROBI RESPONDENT

RULING

1. This ruling is in respect of reference by the applicant arising from ruling of the taxing officer dated 23-05-2022. The reference is made through chamber summons application dated 31st May 2022 in which the applicant prays that;
 1. Spent.
 2. The findings and ruling of Hon. E.M. Nyakundi in Misc application number E789 of 2021 on taxation in regard to the applicant's Bill of Costs awarding a sum of Kshs 1,500,000.00 be varied and/or set aside in relation to item No. 1.
 3. The advocates Bill of Costs dated 19th October 2021 be taxed afresh inter-parties and/or this court proceeds to make a finding.
 4. This Honourable Court be pleased to interrogate the applicant's Bill of Costs in light of actual work done and adopt the applicant's proposal on taxation of costs.
 5. Costs and further incidentals to this application be provided for.
 6. Such further or other relief as the Honourable Court may deem just and expedient to grant.
2. The application is supported by affidavit of Professor Tom Ojienda SC sworn on 31st May 2022. On the face of the application appears twelve grounds which can be summarised as follows;



- a. The taxing officer applied the wrong scale thereby allowing a very low figure and below the scale.
 - b. The taxing officer made an error by referring to matters which were not germane to the matter in question.
3. I have read the application, the supporting affidavit and submissions filed by the parties. It is clear to me that the reference challenges item 1 of the bill of costs only to the extent that the taxing officer applied Third Schedule of the Supreme Court Rules instead of Schedule 6 of the Advocates Remuneration Order. The applicant has not raised any issue with items 2 to 31 of the bill of costs which appear to have been taxed under Schedule 6 of the Advocates Remuneration Order.
4. I will begin with the argument that the taxing officer erred in making reference to matters which were not related to the matter before her. The impugned part of the ruling in this regard is paragraph four which states that;

‘It was their submission that the plaintiff had initially sued UAP Insurance Company limited and sought an amendment to sue the current 2nd defendant. The same was agreed to by consent on the 20th June 2017 and this was the rise of the 1st Bill of Costs. The second Bill of Costs is related to costs awarded in the judgement. Both these entities are different including the terms of management.’
5. Clearly, the above extract of the ruling has no relation to the matters which were before the taxing officer. No one except the taxing officer can explain how this paragraph found its way to the ruling though it would appear that it was a copy and paste from another ruling. Be that as it may, the paragraph in my view does not have a bearing on the outcome of the taxation. The paragraph appears in the introductory part of the ruling and the contents therein are not reflected or repeated anywhere else in the ruling. In her analysis and determination of the bill of costs, the taxing officer did not make any reference to the said paragraph and there is no indication anywhere that it influenced the final orders of the taxing officer. I take this as a slip and an error which does not go into the root of the matters in issue and I do not think the same should be a basis for interfering with the decision of the taxing officer.
6. On the other ground identified above, the applicant argues that the amount allowed on item 1 of the bill was too low and did not take into account the complexity and importance of the matter. The applicant had charged a sum of Kshs 30,000,000.00 on the item which the taxing officer reduced to Kshs 1,500,000.00 after she acknowledged that the matter was complex noting that it was a supreme court matter which was of public interest. With this context, it would be wrong to accuse the taxing officer of failing to appreciate the complexity and importance of the matter. She indicated that she had considered the matter was of public interest and included a lot of research. Perhaps one should think that the amount allowed was not commensurate to the work done.
7. Taxation matters are in the discretion of taxing officer and a judge should not interfere with exercise of the discretion unless it is shown that the taxing officer applied wrong principles or the amount was too unreasonably high or low that it does not reflect the true value of the work done. Other than stating that the matter was a supreme court one, the applicant has not given the extent of the complexity and time taken in completing the brief. The mere mention of research involved and the fact that the matter was in the supreme court is not in my view enough to prove complexity and justification of the amount proposed by the applicant. The applicant did not produce the proceedings in the supreme court or its opinion to enable the taxing officer or this court to appreciate the extent of the complexity.



8. It is trite that use of wrong scale of taxation is an error of principle that would justify a judge interfering with a decision of a taxation officer. The applicant argues that the scale applicable in this matter was Schedule 6 of the Advocates Remuneration Order. The Advocates Remuneration Order does not have a scale for matters before the Supreme Court. That would mean that the taxing officer would apply the scale provided in the Supreme Court Rules which is Third Schedule of the Rules and resort to the scale applicable to the High Court if she finds some items for services whose remuneration is not provided for in the said Schedule. That is the purport of paragraph 9(4) of the Schedule which provides;

‘Other costs shall, subject to the provisions of paragraphs 10, 11 and 12, be awarded in accordance with the scale set out below or, in respect of any matter for which no provision is made in those scales, in accordance with the scales applicable in the High Court.’

9. It is true that an advocate/client bill of costs are issues of commercial transaction between a client and advocate which are regulated by the various Schedules of the Advocates Remuneration Order. The fact that the taxing officer applied the Third Schedule of the Supreme Court Rules does not mean that she went outside the Advocates Remuneration Order. It means that she applied a scale which was applicable for matters in the Supreme Court just the same way she would have used Schedule 6 of the Advocates Remuneration Order. In that regard, I do not see the error on principle in applying the Supreme Court Rules.

10. The applicant has claimed that the amount allowed for item 1 (instructions fees) was too low considering that he had charged Kshs 30,000,000.00. In my view, it does not matter what the advocate charges in his bill. The same is just an expression of what the advocate proposes that the taxing officer allows. It is not a matter of negotiation where the bill of costs is an offer and the taxing officer’s ruling a counter offer or acceptance. The taxing officer has the discretion to tax costs as she finds reasonable and justifiable and not based on the amount charged by the advocate. The fact that the applicant charged 30 million does not in effect make the 1,500,000.00 allowed by the taxing officer unreasonable or too low.

11. The guiding principle on taxation of instructions fees is that the basis for taxation should be the value of the subject matter. However, there are cases where the value of the subject matter may not be ascertained from the pleadings. This is such a case and the taxing officer was at liberty to allow amount which she considered to be reasonable bearing in mind the nature of the case. In *Joreth Limited v Kigano & associates* (2002) KECA 153 (KLR), the Court of Appeal held that;

‘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.’

12. Since the value of the subject matter in this case is not ascertainable, this court can only interfere with the decision of the taxing officer if it is convinced that the amount was too low compared to the nature of the case and the volume and extent of the work done by the advocate. The applicant has not placed material before me enough to convince me that the amount allowed by the taxing officer was unreasonably low.

13. The applicant submits that the taxing officer usurped jurisdiction of the Registrar of the Supreme Court. I do not see where the applicant intends to go with this argument. If one were to follow this line or argument, it would mean that the taxing officer had no jurisdiction to tax the bill of costs.



The Supreme Court Rules tasks its registrar to determine the costs of filing matters in the said court and not advocates clients bill of costs. I do not see where the taxing officer in this matter exercised the jurisdiction of the Registrar of the Supreme Court. In my view, making reference to the Supreme Court Rules and applying the Third Schedule 3 thereto does not amount to usurpation of jurisdiction. The said Schedule provides for party and party costs but it should be remembered that when taxing advocate/clients bill of costs, the taxing officer is not expected to pluck figures from the air.

14. The basis for advocates/client costs is the same Schedule that provide for party and party costs. Even Schedule 6 of the Advocates Remuneration Order the applicant says should have been used, talks of party party costs as basis for instructions fees. Actually, the advocate/client costs is an enhanced version of party and party costs. That is why Part B of the 6th Schedule of the Advocates Remuneration Order states that advocates client costs shall be costs as per Part A in above increased by 50%. In holding so, I am guided by the holding in *Kamunyori & Company Advocates v Development Bank of Kenya Limited* (2015) KECA 595 (KLR) where the Court of Appeal held that;

‘Where an advocate is instructed by a client to sue or defend a suit, providing the advocate does the work, he is entitled to charge for the work he has done. In determining the instructions fee in an advocate/client Bill of Costs, the relevant provision in the Advocates Remuneration Order is Schedule VI B.’

15. The final issue the applicant has taken with the ruling is the taxing officer’s reference to the bill of costs as party and party costs. The applicant argues that by making such a reference, the taxing officer was treating the bill of costs as a party and party costs and as a result made an error of principle. It is true that the last paragraph of the ruling makes reference to the bill as party and party bill of costs where the taxing officer stated;

‘I therefore tax and allow the applicant’s party and party bill of costs dated 28th January 2021 at Kshs 1,932,281/=.’

16. The above statement comes after detailed analysis of the applicant’s bill of costs dated 19th October 2021. Just as the glaring slip in paragraph four of the ruling, this particular part seems to have faced the same fate of editorial errors. First the bill of costs in question was dated 19th October 2021 and not 28th January 2021. Secondly, the bill of costs was an advocate/client bill and not a party and party bill. However, again, I do not see this as a good reason to interfere with the decision on the taxation as the body of the ruling is clear on what bill was being taxed and the figures in the final disposition are the same as in the analysis. In the circumstances, I decline to upset the findings on the amount payable to the advocate.

17. This court has inherent and wide powers to make orders on reference as it may think appropriate and as the end of justice may demand. In exercise of these powers, I will order that this file be placed before the taxing officer for her clarification and correction of paragraph 4 and 11 of her ruling dated 23-05-2022.

18. In conclusion, I hereby make the following orders;

- a. The application dated 31st May 2022 is dismissed.
- b. The taxing officer is directed to make corrections to her ruling dated 23-05-2024 to reflect the true facts as it relates to the true and correct facts of the bill of costs dated 19-10-2021 specifically paragraph 4 and 11 of the said ruling.
- c. There are no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2025.



B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Miss Musando holding brief for Prof Ojienda SC for the applicant and Mr. absence of the respondent.

