J.G. Kariuki t/a Gachiri Kariuki & Company Advocates v Charles Kioko Mutuku t/a Rocham Enterprises (Miscellaneous Civil Application 451 of 2001) [2025] KEHC 1295 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1295 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 451 OF 2001

J NGAAH, J

FEBRUARY 28, 2025

BETWEEN

J.G. KARIUKI T/A GACHIRI KARIUKI & COMPANY ADVOCATES ..... APPLICANT

AND

CHARLES KIOKO MUTUKU T/A ROCHAM ENTERPRISES ... RESPONDENT

RULING

1. This is a reference by the client against the decision of taxing officer in an advocate/client bill of costs dated 6 November 2023 but amended on 7 February 2024. The reference is dated 21 May 2024 and is expressed to be brought under paragraph 11(2) of the Advocates (Remuneration) Order, apparently of 2014. In the reference the client seeks the following orders:

> " 1. That the ruling/decision of the Taxing Officer dated 16th April 2024 allowing the Advocate's Bill of Costs at Kshs. 3,950,396/= be set aside.
>
> 2. That the Advocate's Bill of Costs dated 6th November, 2023 be taxed at Kshs. 800,468.48.
>
> 3. That in the alternative, the Advocate's Bill of Costs dated 6th November, 2023 be referred back for taxation by a different Taxing Officer."

2. The reference is on the grounds that the taxing officer erred in principle by ignoring the advocate's valid objection on items 1 and 82. These items are on instruction fees and getting up fees respectively. To be precise, the taxing officer is said to have erred in principle in assessing the instruction fees based on the figure of Kshs. 30,000,000/= as the judgment amount instead of Kshs. 7,806,132. Accordingly, the

taxing officer erred in principle by allowing or awarding instructions fees of Kshs. 1,200,000/= instead of Kshs. 157,091.98.

3. The taxing officer is also said to have erred in principle by allowing items 2 to 81 and items 83 to 318 in the bill of costs on the ground that they were drawn to scale yet they were what the client says "highly exaggerated". These items range from "receiving and perusing" letters, drawing letters, affidavits, pleadings to court attendances.

4. The taxation of the taxing officer is also impugned because the officer failed to determine the applicable remuneration order upon which she based her assessment and, by and large, she failed to exercise her discretion judiciously.

5. In the affidavit sworn in support of the application, Mr. Charles Kioko Mutuku has stated that he filed and served a notice of objection to the taxation on 30 April 2024 and that he obtained the reasons on 21 May 2024.

6. According to Mr. Mutuku, the value of the subject matter was 72, 279 US Dollars which, at the material time, was equivalent to Kshs. 7,806,132/=. This, according to him, is the amount awarded in the substantive suit and which, for that reason, ought to have been the basis for the assessment of the instruction and getting up fees.

7. Contrary to the taxing officer's finding that the value of the subject matter of Kshs. 30,000,000/= was not in dispute, Mr. Mutua has stated that he had maintained throughout the proceedings that the value of the subject matter was Kshs. 7,825,666.82.

8. Further, the taxing officer is said to have erred in principle in ·allowing an amendment to the bill of costs the effect of which was to increase the value of the subject matter from Kshs. 7,825,666.82 to Kshs. 30,000,000/=.

9. It is the client's position that even if the value of the subject matter was to be reckoned at Kshs. 30,000,000/=, the applicable instruction fees should have been Kshs. 490,000/=. Thus, the taxing officer erred in principle by allowing a sum of Kshs. 1,200,000/= as instruction fees which, in the client's view, was too high and excessive in the circumstances.

10. The assessment by the taxing officer is also impugned because the taxing officer erred in principle by finding and holding that the matter was complex without giving any reason for such a finding. In any event, no such guidance or finding had been made by the trial judge.

11. The advocate opposed the application by way of grounds of objection dated 23 October 2024. In those grounds, the advocate has pleaded that:

> " 1) The application is misguided and unmerited.
>
> 2) The application does not specify grounds upon which the taxation of items 2 81 and 83 – 318 are objected to.
>
> 3) The client in his application misapprehends the value of the subject matter. Dated at Mombasa this 23rd day of October 2024."

12. In the submissions, the client's submissions are largely a replica of what he has pleaded and deposed in the affidavit in support of the reference. As far as the amendment of the bill of costs is concerned, the client has submitted that the amendment violated paragraph 71 of the Advocates Remuneration Order which prohibits alteration of the bill of costs without leave of court or consent of the parties.

13. The client has cited the case of First American Bank of Kenya Ltd -vs- Gulab P. Shah & 2 Others [2002] eKLR, where it was held that, the taxing officer must first set out the basic fee before venturing to consider whether to increase or reduce it. In the instant case, the taxing officer is alleged to have "plucked the basic the figure of Kshs. 1,200,000/= from nowhere and then ruled that '... I assess the instruction fees at Kshs. 1,200,000/ ='".

14. The taxation is also impugned because the taxing officer held the matter to have been complex yet the trial judge did not record such a finding in the judgment. In other words, there was no basis for reaching the conclusion that the matter was complex as to enhance instruction fees.

15. The client cited Republic versus Minister for Agriculture & 2 Otheres, ex parte; Samuel Muchiri Wanjuguna & 6 Others (2006) eKLR on the principles of taxation which include the principle that the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties and that where complexity of proceedings is a relevant factor, the specific elements of the complexity are to be identified and stated. The complexity is to be judged on the basis of the express or implied recognition and directions or orders by the trial judge. Nothing of the sort occurred in the instant case.

16. On his part, the advocate admitted in his submissions that indeed he initially filed a bill of costs dated 6 November 2023 but that he amended it on 7 February 2024. The amendment was as a result of a consent dated 15 December 2023 filed in the Court of Appeal in Civil Appeal No. E105 of 2021. According to that consent, parties agreed that the primary suit would be settled at Kshs. 30,000,000/ = and the costs of the suit in this court and the Court of Apeal, would be Kshs. 1,500,000/=.

17. While relying on Peter Muthoka & another versus Ochieng & 3 others [2019] eKLR, the advocate submitted that the taxing officer was right in pegging her assessment on the figure of Kshs. 30,000,000/ = because the value of the subject matter ought to be determined from either the pleadings, judgment or settlement of the parties. This is consistent with Schedule 6(1)(b) of the Advocates (Remuneration) Order. Other decisions cited for the same proposition are Fidelity Shield Insurance Co. Ltd v Gabriel Ngaruha Kabue [2021] eKLR); Republic v University of Nairobi & another Ex parte Nasibwa Wakenya Moses [2018] eKLR; and, Republic v Minister for Agriculture & 2 others Ex- parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR.

18. The advocate has defended the taxing officer's assement of Kshs. 1,200,000/= as instruction fees as being valid.

19. Two issues, crucial to determination of this reference are, first, whether it was open to the advocate to amend his bill of costs without the consent of the parties or the permission from the taxing officer. The second issue is whether the taxing officer exercised her discretion judiciously in the assessment of the instruction fees.

20. I have had occasion to consider the impugned ruling. As far the amendment of the bill of costs is concerned, the taxing officer noted as follows:

> "The respondents opposed the amended bill indicating that the value(sic) of the subject matter of ksh 30000000 was settled by consent of the parties at the appeal stage and that the applicant advocate was not the one who was handling the matter at that level thus the advocate herein didn't have instructions at the appeal stage. The Deputy Registrar under order 51 of the Advocates remuneration order has powers to admit the amendment and such I hereby admit the amendment in the bill and since parties were able to submit on it then I hereby proceed to tax it."

21. "Order 51" upon which the taxing officer ostensibly relied as authorising her to admit the amended bill of costs does not exist in the Advocates (Remuneration) Order 2014, assuming this is the Remuneration Order under which she taxed the bill. If the taxing officer was referring to paragraph 51 of the Advocates (Remuneration) Order, 2014, it has nothing to do with amendment of bills of costs; rather, it deals with costs in subordinate courts. This paragraph reads as follows:

    51. Costs in subordinate courts according to Schedule 7 Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi's Courts) is that set out in Schedule 7.

22. The only paragraph in the Advocates (Remuneration) Order, 2014 that deals with amendment of the bills of costs is paragraph 71 which reads as follows:

    71. Bills not to be altered after being lodged

    No addition or alteration shall be made in a bill of costs by the party submitting the same after the bill has been lodged for taxation, except by consent of the parties, or by permission or direction of the Court or taxing officer.

23. The word "amendment" is not used in this provision but in the absence of any other provision in the Advocates Remuneration Order addressing amendments of bills of costs in specific terms, this is the only provision that can possibly be invoked where an amendment of a bill of costs is necessary. In any event, the effect of an amendment of a bill of costs would ordinarily "add or alter" the bill in some way and if that be the case, the words "addition or alteration" to which reference has been made in paragraph 71 of the Advocates Remuneration Order, refer to, and are synonymous with the word "amendment". In law, this word is defined as:

    "To change or modify for the better. To alter by modification, deletion, or addition." (Emphasis added). (Blacks Law Dictionary, 5th Edition)

    Thus, "amendment" entails, among other things, "addition or alteration".

24. That said, it is apparent from paragraph 71 of the remuneration order that an amendment of a bill of costs can only be done upon consent of the parties (in the taxation proceedings) or upon the sanction of the court. The presumption is that, where there is no consent, an applicant for an amendment would move the court appropriately for leave to amend in which event a respondent in such an application would be entitled to an opportunity of being heard before the court grants permission to amend, if it is inclined to.

25. In the instant case, there was no consent to admit the amended bill of costs and neither was there any order granting leave or permission for the advocate to amend his bill of costs. As a matter of fact, there was no application for amendment of the bill of costs before the amended bill was filed.

26. In these circumstances, there was no legal basis upon which the taxing officer could proceed to tax the amended bill of costs as if it was procedurally on record. In the absence of a consent or an application for amendment to which the client would have been entitled to respond and, in the absence of the sanction from the taxing officer, admitting the bill of costs prior to the taxation, the taxing officer could not purport to admit the bill of costs and act upon it to the prejudice of the client. On this score alone, the taxation of the advocate/client bill of costs is tainted. It is contrary to paragraph 71 of the Advocates (Remuneration) Order and, therefore, cannot be allowed to stand.

27. But even if the bill was properly on record, I am not persuaded that the taxing officer properly exercised her discretion in enhancing the instruction fees and which, resultantly, impacted the getting up fees. In her assessment of the instruction fees and getting up fees, the taxing officer held as follows:

> " In this instant case, the value of the subject matter was settled at Kshs. 30,000,000/=. Taking into consideration the complexity of the matter, the responsibility borne by the advocate and the time expended in the matter, the same is taxed as drawn and in accordance to schedule vi of the advocates remuneration order I asses the instruction fees at ksh,1,200,000 then its followed by getting up fees of ksh 400000/ which is a third of the instruction fees."

28. On this issue, I must begin by stating that it is trite that while the judge to whom a reference has been made may not interfere with quantum of fees assessed as instruction fees, that exercise of discretion by the taxing officer in this regard will be disturbed if the taxing officer erred in principle in assessing costs. An award of an inordinately high figure as instruction fees, for instance, is, in itself, an error of principle. This was so held in Kipkorir, Titoo & Kiara Advocates versus Deposit Protection Fund Board (supra) where the court noted:

> " An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles".

29. In the instant case, no details have been given of how complex the case out of which the taxation arose was. Nor did the taxing officer provide any details of what she thought was the responsibility borne by the advocate or the time he spent on the matter. The assertion that, "taking into consideration the complexity of the matter, the responsibility borne by the advocate and the time expended in the matter" as having influenced the determination of instruction fees is also ambiguous and, in my humble view, it ought not to have formed the basis of the learned taxing officer's assessment.

30. The learned taxing officer was enjoined to provide more details and demonstrate, for instance, the complexity of the case in some detail, the nature or responsibility said to have been borne by the advocate as would justify the enhancement of the instruction fees to Kshs. 1,200,000/= and; the time the advocate spent on the matter.

31. Although the learned magistrate citedJoreth Limited v Kigano & Associates [2002] 1 EA 92 at 99, where the Court of Appeal of appeal held, inter alia, that in assessing the instruction fees where instruction fees is not ascertainable from the pleadings, judgment or settlement, 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 the 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, it is not sufficient to simply lay out the principles of taxation, the factors to consider in taxation and conclude, for instance, that, "I asses the instruction fees at ksh,1,200,000 then its followed by getting up fees of ksh 400000/ which is a third of the instruction fees."

32. In Republic versus Minister for Agriculture & 2 Others, ex parte; Samuel Muchiri Wa Njuguna & 6 Others (2006) eKLR, it was held that it is not enough for the taxing master to generally state the complexity of the matter, the time spent on it, the research done or the skill deployed. The court noted as follows:

> " 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, 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 clarified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart of cause from the need to show if such works have not already been provided for under a different head of costs."

33. As I have previously held elsewhere in references similar to the instant one, I must not be mistaken to be saying that the taxing officer should reproduce the parties' pleadings as filed in the primary suit or their submissions. A summary of such aspects of taxation as the "time taken", "the importance of the matter" "the interest of the parties", "the volume of the pleadings", "the scope of the work done" and "the nature of the dispute", that is detailed enough, at least to the extent of the parties, and the judge to whom reference has been made, appreciating these features would suffice. This was not done in the taxation in issue.

34. For the reasons I have given, I am inclined to reach the inevitable conclusion that the assessment of the instruction fees at Kshs. 1,200,000/= was an exercise of discretion based on an error of principle. It follows that even if the amended bill of costs was properly before court, I would have allowed the applicant's reference to the extent that the assessment of instruction fees and getting up fees was informed by improper exercise of discretion.

35. The reference is hereby allowed and the taxation of the advocate/client bill of costs dated 6 November 2023 but amended on 7 February 2024 is set aside. Having found that the bill was filed and taxed contrary to paragraph 71 of the Advocates Remuneration Order, it would be futile to purport to remit it to the taxing officer for re-taxation. The appropriate order is to strike out the bill of costs. It is hereby struck out. The client will have costs arising out of the taxation proceedings and the instant reference. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 28 FEBRUARY 2025

NGAAH JAIRUS

JUDGE