



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

NCBA Bank (K) Ltd v Seaman Building & Civil Engineering Ltd & 3 others (Miscellaneous Application 97 of 2022) [2025] KEHC 1004 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION 97 OF 2022
SM MOHOCHI, J
FEBRUARY 27, 2025**

BETWEEN

NCBA BANK (K) LTD APPLICANT

AND

SEAMAN BUILDING & CIVIL ENGINEERING LTD 1ST RESPONDENT

FRANCIS MACHARIA MBUGUA 2ND RESPONDENT

SCHOLASTIC WANGU MACHARIA 3RD RESPONDENT

MARGARET MUTHONI MACHARIA 4TH RESPONDENT

RULING

Introduction

1. Before me is a chamber summons Reference Application dated 8th August 2022 filed pursuant to Paragraph 11 of the [*Advocates Remuneration Order*](#) where the Applicant is seeking the following reliefs;
 - i. That, this Court be pleased to review, vary and set aside the decisions of the Taxing Officer delivered on 28th June 2022 and 29th June 2022 that taxed the 1st and 2nd Respondents' and the 3rd and 4th Respondents' Bill of Costs both dated 23rd July 2020 at Kshs. 1,933,976.15 and Kshs 1,934,786 respectively.
 - ii. That, the said Party and Party Bill of Costs dated 23rd July 2020 be remitted to the Taxing Officer or a different Taxing Officer with directions for fresh Taxation
 - iii. That, the costs of this Application be provided for.
2. The Application is supported by the sworn affidavits of Jackson Kingori, and is premised on the following seven (7) grounds as follows;



- a. That, the amounts of Kshs. 1,933,976.15 and Kshs 1,934,786 awarded to the 1st and 2nd Respondents' and the 3rd and 4th Respondents with respect to their Party and Party Bill of Costs are manifestly excessive and unjustifiable and the same are way above the provisions of Schedule VI Part I of the *Advocates Remuneration Order*.
 - b. That, the Taxing Officer erred in fact and law, by failing to determine the appropriate instruction fees payable to the 1st and 2nd Respondents' and the 3rd and 4th Respondents based on the value of the subject matter.
 - c. That, the Taxing Officer misdirected herself by failing to carefully consider the principles established in Schedule VI Part A Paragraph 1b in arriving at the figure of instruction fees.
 - d. That, the Taxing Officer erred in fact and law, by failing to consider the fact that the suit was determined in a summary manner without going to full trial, when arriving at the full figure of instruction fees.
 - e. That, the Taxing Officer erred in fact and in law, by awarding the 1st and 2nd Respondents Item 11(p) which is double charge of item 11(e) of the Bill of Costs, which relates to the service of Memorandum of Appearance upon the Plaintiff's Advocates thereby making an erroneous decision.
 - f. That, the Taxing Officer erred in law, in failing to consider the established principles of law in determining the instruction fees and other items listed in the Bill of Costs:
 - g. That, this Honourable court is entitled to interfere with the wrongful exercise of powers by the Taxing Officer
3. This Court on the 21st November 2023 allowed the Applicants extension of time to file this reference and parties filed and exchanged written submission by the 30th November 2024 with the Ruling being reserved for the 28th January 2025. Owing to exigencies of work the delivery of this ruling is delayed by one month.
 4. The Applicant filed its written submissions on the 27th of November 2024 and 1st and 2nd Respondents' and the 3rd and 4th Respondents filed their written submissions on the 30th November 2024.

Applicant's Case

5. The Applicant has extensively submitted on contents I shall not regurgitate, but in summary it is the Applicants submission that the taxation of the main item number 1, instruction fees was flawed owing to the fact that the primary suit never went to trial.

Respondents Case

6. The Respondents made identical submissions opposing the reference for not satisfying the principles for review and that they were as of right deserving and entitled to costs.
7. They urged for the dismissal of the motion as being baseless lacking merit and being an abuse of the process of court.

Analysis and Determination

8. Considered the pleadings by the parties, the trial court records albeit mixed up to confuse and obfuscate actuality and reality, the rival written submissions, the cited authorities and it is my humble view that the issue for determination is whether the instant reference is merited.



9. It is settled law that, any grievance emanating from a Ruling on Taxation can only be ventilated through Paragraph 11 of the *Advocates Remuneration Order*. In *Machira & Co. Advocates v Magugu* [2002] EA, Ringera J (as he then was) held as follows:

“As I understand the practice relating to Taxation of Bills of Costs, any complaint about any decision of the Taxing officer whether it relates to a point of law taken with regard to Taxation or to a grievance about the Taxation of any item in the Bill of Costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

10. Similarly, in the case of *Gacau Kariuki & Co. Advocates v Allan Mbugua Ng'ang'a* [2012] eKLR it was held thus: -

“I am also of the same school of thought as the learned judges’ as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has misdirected himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference.” [emphasis added]

11. The Applicant craves for an order that, the ruling delivered on delivered on the 28th June 2022 and 29th June 2022, be set aside.

12. The principles for setting-aside the decisions of a Taxing Master were well established by the Court of Appeal in the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR 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.”

13. The proper exercise of discretion by the Taxing Officers was restated in the case of *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] Civil Appeal 206 of 2006, where it was held that;

“...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside.”

14. Before turning to whether the taxing officer did or did not make an error of principle, let me start by observing while the Reference indicate it is supported by a sworn Affidavit of Stephen Atenya, the same is actually supported by a sworn affidavit of Jackson Kingori.



15. The Respondent laments of the reference filed out of time despite the court's extension of time on the 21st November 2023.
16. This court ascribes to the school of thought that, when sitting in reference this court is not a taxing court, and where it finds for an applicant in a reference, it would thus refer back the matter for a fresh taxation.
17. The other aspect herein is while this Application is framed and couched as a Reference it simultaneously invites the court to review the Taxation undertaken by a taxing master, in essence the Applicant appears to invite this court into realm of undertaking a taxation. This court declines such overtures and shall only consider if the taxing master committed any error of principle or whether the sum awarded was so manifestly excessive and an error of principle can be inferred or if instructions fee was arrived at on the wrong principles? As the parameters for this reference. Any invitation at taxation shall be ignored.
18. This court is unpersuaded that the Applicants have satisfied conditions for review as is provided for under Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule 1 of the *Civil Procedure Rules*.
19. The record before the taxing master is indicative of full participation by the Applicant in the Taxation and that there is no discovery of any new and important matter which after due diligence was not within the knowledge of the Applicant or could not be produced during taxation and ruling on taxation and there is no error apparent to warrant any review. I would only consider the last limb "any other sufficient reason" after testing the first two principles and in this instance, I find no reason for interference as no other sufficient reason has been argued or presented.
20. I therefore find that there was absolutely no basis upon which the Reference herein, which does not even adhere to the procedure established under paragraph 11 of the *Advocates Remuneration Order*.
21. I have considered the filed bill of costs and all items listed thereon noting that none of them bears any items marked as Item 11(p) or item 11(e) as alleged by the Applicant and that no double taxation is showcased.
22. The Supporting Affidavit of the Chamber Summons refers to Exhibits EM1, EM2 and EM3 this being copies of the bills of costs, copy of the ruling and copy of letter requesting for reason for taxation dated 6th July 2022, this court observes a deliberate effort at obfuscation in that all the annexed exhibits are purportedly annexures to an affidavit by Stephen Atenya non exist, exhibit EM3 consists of over twenty-one (21) mixed-up, unclear pages of the typed proceedings in HCC No 20 of 2019, Exhibit EM2 has found space within the mixed up pages in EM3 and the Application as presented fails in presentation to persuade the court as to any merit. A deeper consideration of the Supporting Affidavit by the Applicants mainly reveals three (3) reasons for the reference;
 - a. Firstly, that the bill as taxed is manifestly excessive and unjustifiable.
 - b. Secondly that the taxing master failed to determine the appropriate instruction fees payable to the 1st and 2nd Respondents.
 - c. That the taxing master made an erroneous decision by awarding the 1st and 2nd Respondents item 11(p) which is double charge item 11(e) of the bill of costs relating to service of a memorandum of Appearance.
23. Nothing has been presented by the Applicants to persuade me that the instruction fees as taxed was manifestly excessive as to justify interference or lead to an inference of an error of principle and the



lengthy mathematical calculations by the Applicant yield varied sums as instruction fees from the taxed instruction fees, the difference is insignificant and cannot be and is not manifestly excessive.

24. I find no fault in the manner of taxation in general and the Applicants had participated in two taxations wherein the Respondents had provided their draft bills of costs; the onus was in this instance upon the Applicants to showcase their alternative during taxation otherwise it remains a hollow claim that the taxing master failed to ascertain an “appropriate” instruction fees. I have considered the proceedings noting that the taxing master deployed similar principals in ascertaining this item, in both Applications by the 1st and 2nd Respondent as well as the 4th and 3rd Respondents and it remains foolhardy to cast aspersions on one while ignoring the other.
25. I find this application frivolous and vexatious and intended to delay the settlement of costs of the suit as properly assessed by the Taxing Master, Hon, N. Makau, Deputy Registrar, which bills were also drawn to scale by the Respondents counsels and taxed off at 75% on instruction fees owing to the resolution of the dispute before going to trial.
26. I further note that the taxing master taxed off completely entire items number 2 and 3 on the same rationale which I find to be sound.
27. This court has equally appreciated the institution of the primary suit and the circumstances of its resolution before trial finding the soundness of the costs awarded to the Respondents.
28. I therefore hold and find that the Chamber Summons dated 8th August 2022 is devoid of any merit and the same is dismissed with costs to each of the Respondents, assessed at Kshs 50,000, payable within 14 days of this order in default, the Respondents are at liberty to execute for recovery.
29. This file is hereby closed.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 27TH FEBRUARY 2025

MOHOCHI S.M

JUDGE

