



Lubulellah & Associates v Terra Craft (K) Limited (Miscellaneous Application E793 of 2022) [2025] KEHC 3882 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E793 OF 2022**

H NAMISI, J

MARCH 28, 2025

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATE

AND

TERRA CRAFT (K) LIMITED CLIENT

RULING

1. Before the Court is Chamber Summons dated 1st March 2024, brought under Rule 11(1) to (4) of the [Advocates Remuneration Order](#) seeking the following orders:
 - i. That this Court be pleased to set aside the Ruling on taxation delivered by the Taxing Officer (Hon. Stephany Bett) on 8 February 2024 in respect of items 1, 2, 3, 4, 26, 27 and 30 of the Advocate/Applicant's Bill of Costs dated 8 November 2022 and remit the same for re-taxation before a different Taxing Officer other than Hon. Stephany Bett, or proceed to re-assess the said items in the interest of saving judicial time;
 - ii. That the costs of the Application be provided for.
2. The Application is supported by the Affidavit sworn by Eugene L. Lubulellah and premised on the following grounds:
 - i. The Taxing Officer made a grave error in principle by to taxing the Bill of Costs under the wrong scales, Schedule 11 of the [Advocates Remuneration \(Order\) 2014](#) (Costs Of Proceedings Before Tribunals Other Than Those Under Schedules 8 And 9 Of This Order Except mere Otherwise Prescribed Under The Act Setting Up The Tribunal), instead of under Schedule 6, Paragraph 1 (b) of the [Advocates Remuneration \(Order\) 2014](#) (costs Of Proceedings In The High Court) as read with the provisions of Rule 10(2) of the [Arbitration Rules 1997](#) , which



provides that "all fees in arbitral proceedings shall be calculated in accordance with the scale of fees applicable to the High Court".

- ii. On Instruction Fees for both the Claim and Counter-Claim drawn under items 1 & 3 of the Advocate & Client Bill of Costs, the Taxing Officer made a grave error in principle by awarding less than the minimum basic instruction fees prescribed under Schedule 6, Paragraph 1 (b) of the Advocates Remuneration (Order) 2014 as read with Rule 10 (2) of the Arbitration Rules 1997;
 - a. The minimum basic instruction fee in respect of the Arbitral Claim ought to be no less than Kshs. 2,518,628.27 as the Arbitrator's Final Award in respect of the Claim the subject of these Taxation proceedings was for a total of KSHS. 153.241.885.08 + Compound Interest @ 14% per annum from 18th November 2018.
 - b. The minimum basic instruction fee in respect of the Arbitral Counter-Claim ought to be no less than Kshs. 971,875.67 as the Counter-Claim in the subject arbitration was for Kshs. 32,229,619 + Kshs. 17,895,425-90 (See paragraphs 4.0 - 4.12 (particularly Paragraph 4.2) of the Arbitrator's Final Award, at pages 357-360 of the Advocate/Applicant's Bundle of Documents filed herein) bringing the total counter-claimed sum was thus Kshs. 50.125.044-90.
- iii. Again, on instruction fees (items 1 & 3), the Taxing Master abdicated her judicial duty to exercise discretion judiciously, and consequently committed an error in principle, by failing to take into account and consider ALL the relevant factors for increasing the basic instruction fees, as set out in the Applicant's written submissions, which required her to take into consideration the principles set out in the case of Ramesh Naran Patel vs Attorney General and Another, constitutional Appl. 1 of 2009 (cited with approval in KTK Advocates v Fina Bank Limited [2014] eKLR) which are specifically:
 - a. care and labor required by the Advocate
 - b. the number and length of papers to be perused
 - c. the nature and importance of the matter
 - d. the value (where ascertainable) of subject matter
 - e. interest of the parties
 - f. complexity of the matter
 - g. Novelty of the matter.

The instruction fees on the claim and counterclaim ought to have been reasonably increased by taking into consideration all the above relevant factors and principles of taxation, which she did not.
- iv. Further, the Taxing Officer made a fundamental error in principle by disregarding while failing to appreciate and uphold the trite and binding legal principle that a Counter-Claim is a separate and independent suit from a claim by a claimant and is subject to a separate instruction fee, as has been held by this court in the cases of Odera Obar & Co. Advocates v U Design & 2 others [2016] eKLR, Kagwimi Kang'ethe & Co Advocates v Nairobi Mamba Village Limited [2015] eKLR and Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others [2014] eKLR, to name a few.



- v. On fees for getting up, drawn under items 2 & 4 of the Advocate & Client Bill of Costs, the Taxing Officer's assessment on getting up fees was tainted by her erroneous assessment of instruction fees, and thus must be set aside and substituted for the correct sum being a third (1/3) of the correct sums of instruction fees for both the Claim and Counter-Claim as re-assessed upon re-taxation by another Taxing Officer or as re-assessed by this court.
 - vi. The Taxing Officer's assessment of Items 26, 27 & 30 of the Advocate & Client Bill of Costs were equally tainted by her erroneous assessment of instruction fees and getting up fees under items 1, 2, 3 & 4 thereof, and must thus be set aside and substituted with correct sums, determined by the sums re-assessed upon re-taxation by another Taxing Officer or re-assessed by this court.
 - vii. It is in the interest of Justice and fairness that the Orders sought in the Application filed herewith be granted.
3. The Supporting Affidavit is a repetition of the grounds of the Application.
 4. The Client/Respondent filed a Replying Affidavit opposing the Application. The Respondent averred that the Taxing Master did not make an error in principle and applied the correct scale, being Schedule 11 of the Advocates Remuneration Order, 2014. The Respondent further averred that the sum used by the Taxing Officer of KES 197,370,019.08 was correct since the same was inclusive of the arbitral award and counterclaim as the basis of calculating instruction fees. The Respondent argued that the basis of calculating instruction fees should be the figure in the final award only, but the Taxing Master was more than generous by including the counterclaim in the figure of KES 197,370,019.08.
 5. Parties filed their respective submissions, which I have considered
 6. It is commonplace that courts will not interfere with the Taxing Officer's discretion in determining costs except where there is an error in principle. This is the position that was stated in *Republic v Attorney General Ex parte Kirinyaga Construction Company Ltd* [2015] eKLR wherein it was held that:

“.....Further it has been held that the court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing officer or even the judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of Remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel if preeminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public



interest that cost be kept to a reasonable level so that justice us not put beyond the reach of poor litigants.”

7. Having said that, the question that arises herein is whether the Taxing Officer erred in principle in adopting Schedule 11 of the Advocates Remuneration Order in taxing the Advocate/Applicant’s costs.

8. In *Kerosi Ondicki & Company Advocates v Narok County Government*, [2017] eKLR, the court held as follows regarding the applicable Schedule: -

“I note that the Taxing Master relied on the Advocates Remuneration Order of 2009 and in particular Schedule VI (1) (K) which deals with the costs to be awarded in respect to the presentation of an arbitrator’s award. My finding is that the Taxing Master did not err in principle, in relying on the provisions of Schedule V1 1(K) of the Advocates Remuneration Order when assessing the instruction fees so as to warrant the intervention of this court as the said schedule is very clear on the amount to be awarded for presentation of arbitrator’s award.”

9. In *Nyaundi Tuiyott & Company Advocates v Tarita Development Ltd* [2016] eKLR, it was held: -

“It is common ground that the law applicable to the impugned taxation was Schedule V1 of the Advocates Remuneration Order in view of the provisions of Rule 10(2) of the Arbitration Rules which provides that all fees in arbitral proceedings shall be calculated in accordance with the scale of fees applicable to the High Court. Schedule VI provides the formula for taxation of both party and party costs and advocates/clients costs in matters filed in the High Court. It prescribes the minimum amount which can be awarded as instruction fees based on the value of the subject matter as can be ascertained either from the pleadings, judgment or settlement between the parties. In addition, the provision gives the taxing master wide discretion in increasing or reducing he amounts specified under the schedule.

I am thus in total agreement with Angote J in *Kenyariri & Associates Advocates V Salama Beach Hotel Ltd & Others* [2014] e KLR that the value of the subject matter should not be determined solely from the pleadings. The amount stated in the pleadings should only determine the value of the subject matter if at the time of taxation, the suit had not been determined. But if taxation takes place after the matter in question had been determined either by the court in a judgment or by consent of the parties, then the taxing master should calculate instructions fees based on the amount awarded by the court or the sum agreed upon by the parties. But since the taxation in this case was in respect of arbitration proceedings, which had been determined at the time the bill was taxed, the taxing master ought to have calculated instruction fees on the basis of the Arbitration Award.”

10. Rule 10(2) of the *Arbitration Rules* provides as that all fees for any proceedings under the Act shall be calculated in accordance with the scale of fees applicable to the High Court. The Respondent argued that this Rule applies only to proceedings instituted in the High Court under the *Arbitration Act*. The Respondent contended that the taxation of costs is strictly under the *Advocates Act* and the *Advocates Remuneration Order*.

11. In reading Rule 10(2), it is clear that the same refers to any proceedings under the *Arbitration Act*. That being the case, the applicable scale of fees is the Schedule 6 of the *Advocates Remuneration Order* and not Schedule 11.



12. Therefore, it is my finding that there was error in taxing the Bill of Costs under Schedule 11. The Application dated 1 March 2024 is allowed. The Ruling delivered on 8 February 2024 is set aside in respect of item numbers 1, 2, 3, 4, 26, 27 and 30. It is hereby directed that the Bill of Costs be remitted for re-taxation before a different Taxing Officer other than Hon. Stephany Bett. I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF MARCH 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Eugene Lubullelahfor the Advocate/Applicant

Ms. Ngeresa.....for the Client/Respondent

Libertine Achieng... Court Assistant

