



**Babu Law Firm v Gituiku (Miscellaneous Application E111 of 2020)  
[2023] KEELC 15895 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15895 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E111 OF 2020  
AA OMOLLO, J  
FEBRUARY 23, 2023**

**BETWEEN**

**BABU LAW FIRM ..... ADVOCATE**

**AND**

**THAIRU GITUIKU ..... CLIENT**

**JUDGMENT**

1. The applicant filed a reference against the ruling of the taxing master delivered on June 24, 2021 vide the chamber summons dated July 7, 2021. The Applicant sought for the following reliefs;
  1. Spent
  2. That the honourable court be pleased to set aside the taxing master's ruling delivered on June 24, 2021 that dismissed the Advocates/Client Bill of costs dated November 20, 2020.
  3. That this honourable court be pleased to reassess the fees due to the Advocate/applicant and/or in the alternative the matter to be remitted to such other Taxing master as the court may direct for re-assessment ab initio.
  4. That cost of this application be provided for.
2. The application was premised on the grounds that the Applicant was dissatisfied with a ruling delivered on June 24, 2021 by Deputy Registrar dismissing Advocate/Client bill of costs dated November 20, 2020 misdirected herself after omitting to take into account relevant factors including the completion of the assigned scope of work done, certificate of postal search proving completion of transaction, value of the subject matter, relevant Remuneration Order applicable being Schedule I of the [Advocates Remuneration Order](#), their submissions and the evasive conduct of the Respondent .
3. In an affidavit sworn in support of the application, the applicant stated that the taxing master erred when she failed to apply the proviso under Schedule 1 of the [ARO](#) which require to consider the nature



and importance of the matter, the amount involved, and the interests of the parties. That the taxing master failed to give weight of the evidence by the Advocate/Applicant on the malicious conduct of the Respondent of averting paying the outstanding legal fees. The Applicant states that Deputy Registrar continuously referred to the Advocate as “she” in the ruling despite being a firm raising suspicion of bias. The applicant urges this court to allow the orders and reassess the bill of costs instead of resending it to the taxing master.

4. The Application was opposed by the respondent vide grounds of opposition dated September 23, 2021 and replying affidavit sworn by Thairu Gituiku on the same date. In the grounds, the Respondent pleaded as follows;
  1. The Application is devoid of merit and ripe for dismissal as the advocate/Applicant has failed to comply with rule 11(1) of the *Advocates (Remuneration) Order*.
  2. The Application is defective, grossly incompetent and lacks foundation, as no notice had been issued to the Deputy Registrar by the requiring reasons for the taxation before launching the reference.
  3. The Application offends the provisions of Rule 11 of the *Advocates (Remuneration) Order* and is at best incurably defective, improper, un-procedural and an abuse of the court’s due process.
5. The client/respondent deposed that that the Ruling delivered by the Hon. Diana Orago DR, on 24th of July 2021, was based on the pleadings that were filed by the parties, since the Advocates Bill was for a noncontentious matter, hence the Taxing Master considered all the such factors as that existed in the actual case before her, and it is not true that the Taxing master erred in principle as alleged. That the the Taxing Officer fully considered the scope of work done vis-a-vis the instructions as well as the amount he had paid,
6. In responding to allegations of unclean hands on his part, the Respondent deposed that that the applicant did not produce an iota of evidence of my malicious conduct and/or unclean hands as alleged, and to the best of my knowledge, this is the first time the applicant is raising such an allegation, as the same was never raised before the Taxing Master. He stated further that state that I was forced to deal with the Purchaser directly owing to the Advocate/ applicant 's failure to fully carry out my instructions, despite the fact that I had already paid substantial fees, and it is also not true that the instructions he issued to the Advocate/ applicant were ever completed, as alleged, since to date he was yet to obtain separate title deeds, to enable me to transfer the same
7. The applicant and respondent filed their submissions dated July 12, 2022 and August 19, 2022 respectively. The Applicant submitted that the Taxing Officer’s ruling should be varied as she omitted to take into account relevant factors and established principles of taxation citing the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005]eKLR, *Vipul Premchand Haria vs Kilonzo & Company Advocates* (2020)eKLR, *Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & another*[1972]EA 162 and *Thomas James Arthur v Nyeri Electricity Undertaking* [1961]EA 492 emphasizing that courts will only interfere with taxation of costs if it thinks the award granted amount to an injustice to one party or the other and therefore this court should consider the value of the work undertaken by the applicant on behalf of the respondent.
8. The Applicant submitted that it completed the scope of work agreed on, whose subject matter was valued at Kshs.33,000,000 and Kshs.34,000,000. That having attended the registry to conduct due diligence and official search and that the Respondent paid 50% of the agreed legal fee of Kshs.597,500 therefore should be awarded taxation of the balance being Kshs.597,500.



9. The Applicant submitted that an Advocate is entitled to full instruction fees upon receipt of instructions and the progress of the matter is irrelevant relying on the case of *Ratemo Oira & Company Advocates v Magereza Sacco* (2019)eKLR and noted that the Respondent was malicious in reaching out to the purchasers directly to evade payment of the fee balance.
10. The Applicant further submitted that there is reasonable perception of bias as was addressed by the Court of Appeal in the case of *Kalpana Rawal v Judicial Service Commission*(2016) by the Taxing master on account of calling the advocate a “she” yet the applicant is a firm and dismissing a separate bill of cost on the same day filed by the same Advocate.
11. The Respondent submitted that the Applicant’s reference is incompetent for non-compliance with Rule 11(1) of the *Advocates Remuneration Order*. They relied on the case of *Charles K Maiyo & another v John Mburu & another* [2021]eKLR, *Machira & Co Advocates v Arthur K Magugu & another* [2012] eKLR, *Gacau Kariuki & co. Advocates v Allan Mbugua Nganga* [2012] eKLR, *National Assembly v James Njenga Karume* Court of Appeal at Nairobi *Civil Application No 92 of 1992*, which held that applications in violation of the Provisions of Rule 11 of the *Advocates (Remuneration) Order* are incurably defective, improper, un-procedural and an abuse of the court’s due process.
12. The respondent submitted that the Applicant never issued a notice of the items they objected to nor did they seek reasons from the Deputy Registrar within 14 days, from June 24, 2021. That the Applicant having failed to strictly comply with the procedure for challenging the decision of the taxing officer and not bothering to seek an extension of time to comply with the laid down procedure, the Chamber Summons dated July 7, 2022, ought to be dismissed with costs.
13. The respondent further submitted that the applicant did not perform his instructions nor complete the agreed scope of work which entailed successfully registering the transfer of the properties from the Respondent to the two purchasers hence the taxing master considered all the relevant factors on arriving at her decision and did not err in principle. He cited the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR which defined an error in principle and also the case of *Mary Wangui Karanja & another v Joseph Njenga & 2 others* [2020] eKLR where the court observed that the general conduct of the matter is one of the relevant factors to be considered by the taxing officer when assessing instruction fees.
14. The respondent further submitted that an advocate is not entitled to the full instruction fees merely for issuance of instructions and relied on the case of *Mayers and another v Hamilton and others* [1975] 1 EA 13 (CAN), where the East African Court of Appeal held that an Advocate will not ordinarily become entitled at the moment of instruction, the entitlement under instruction fees grows as the matter proceeds and therefore this court has no basis to interfere with the ruling of June 24, 2021.
15. Having read and analyzed the pleadings, the submissions and the case law cited by the respective parties, the court framed the following two questions for determination of the reference;
  - i. Whether the reference is defective
  - ii. Whether the ruling on the Bill of cost should be set aside/taxed afresh
16. Rule 11 of the *Advocates Remuneration Order* provides;
  11. Objection to decision on taxation and appeal to Court of Appeal



- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he 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.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

17. In the case of *Ahmed Nassir v National Bank of Kenya Ltd* [2006] EA the court held:

"Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."

18. In this instant case, it is true the Applicant did not serve notice to the taxing master. However, the reference does not concern disagreement on the items taxed off rather it's on the order which found the applicant was not entitled to tax their bill. The reasons disputed is contained in the impugned ruling and so does not make the reference incurably defective. The ruling appealed against was made on 24<sup>th</sup> June and this reference brought on July 7, 2021 which falls within the period of 14 days provided in law to bring a reference.
19. The Deputy Registrar exercises discretion which this court cannot interfere with unless it is shown that the Taxing Master acted on the wrong principles of law such that the amount awarded is so high or so low as to amount to injustice to one of the parties or that there was a defect in the decision on the case upon merits or that the discretion has not been exercised judiciously. A Taxing Officer's decision is not exercised judiciously where a relevant factor has not been taken into account, or irrelevant considerations have been taken into account.
20. In this case, the Applicant stated that the Registrar did not factor in the certificate of postal search showing the scope of work completed. The applicant also contended that having been issued with instructions, the respondent ought to have been paid the full amount of fees agreed on. In the case of *Ratemo Oira & Company Advocates v Magereza Sacco* (2019)eKLR, the court of Appeal held,
 

"indeed, it is trite that an advocate is entitled to his fees once he is instructed, retained or employed by a client. (See Civil Appeal No. 280 of 2015, *Desai Sarvia & Pallan Advocates*



*v Tausi Assurance Company Limited* [2017] eKLR). However, it must be noted that an Advocate will be entitled to payment of a reasonable fee which is commensurate with the work done. The business of taxation of costs must ensure a delicate balance between the guiding principles aptly pronounced by the Premchand case which include: the “court owes a duty to the general public to see that costs are not allowed to rise to such a level as to deprive of access to courts but the worthy” and “the general level of the remuneration must be such as to attract worthy recruits to the profession”. What is a reasonable fee in the circumstance can only be adjudicated by a taxing master by application of his discretion?”

21. From the facts of this case as brought out by the parties, there is no dispute that there existed an advocate-client relationship. There is no doubt that there was an agreement of fee to be charged at the commencement of the works. According to the Applicant, she conducted a complete search on the instructions of the Respondent and is entitled to the work done. The Applicant has also confirmed that the Respondent had made a payment of Kshs.597,500. In dismissing the bill of costs, the Taxing Master observed that indeed the Applicant had completed the works as per the instructions, then she would have had more documents as proof of the completed transaction. The taxing master made reference to the decision of *Ratemo Oira & Company Advocates*(*supra*), and proceeded to hold that the amounts already paid by the respondent were reasonable in the circumstances.
22. The Applicant highlighted the details of instructions he undertook under paragraph 6 of their submissions to include, the transfer and registration of the interest in the suit property from the estate of Benard Gituku Njogu to the respondent as co-administrator and to have the encumbrance of LR No. 6725/28 successfully discharged to enable the respondent transfer plots 5 and 6 to the purchasers. The applicant added that they prepared sale agreement in respect of the two plots.
23. In paragraph 8, the applicant submitted that vided a letter dated April 23, 2020, she requested for the settlement of their fees but the respondent failed, ignored or refused to make the payment which failure resulted in the advocate-client bill being filed in court. The issue is what persuaded the taxing master to find that the applicant did not complete the task assigned. The respondent submitted that it is not true as gleaned from their replying affidavit and further affidavit filed before the Taxing Master, that the applicant firm never completed the instructions as the respondent had to engage another firm of Advocates to complete the work
24. The point of disagreement is on the scope of instructions accomplished. The taxing master was persuaded that the applicant was not entitled to the total fee because the applicant did not produce sufficient documents proving completion of the assignment. The Respondent does not deny the transfer and registration of title 6725/28 into her names. Further, there is no denial of the discharge of the encumbrance or the preparation of the sale agreements in respect of plot 5 and 6 between the respondent and the purchasers. Taxing master itemised the scope of the instruction in paragraph one of the ruling. Neither of the parties argued before the taxing master that the instructions accomplished by the applicant constituted 50% of the total instructions given considering that the fee note was inclusive of the disbursements
25. The Taxing master ought to have explained which part of the instruction that was performed by the applicant instead of the holding that there were no documents produced. Her conclusion was in conflict with her observations at paragraph one of the ruling. Thus, the decision by the taxing master that whatever amount of fees paid was sufficient was reached without a foundation. On the issue of bias premised on the ground that the taxing master referring to the Advocate as “she”, this is a pronoun that is proper and used by all judicial officers to avoid repetition. In certain instances, even companies or institutions are referred to as she/her. I find the ground on bias as not proved.



26. It is my view and I so hold that the taxing master did not apply the correct principles dismissing the bill of Costs. As a result, she misdirected herself and caused an injustice to the applicant which warrants this court to interfere with the exercise of her discretion. Consequently, the order disallowing the applicant's bill of costs is set aside and in its place, an order is made that the applicant's bill shall be taxed afresh by a different taxing master.
27. The costs of the reference is awarded to the applicant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023**

**A. OMOLLO**

**JUDGE**

**In the presence of**

Njenga h/b for Ms Kihara for the Applicant

N/A for the Respondent

