



**Tom Ojienda & Associates v Maasai Mara University Council
(Commercial Miscellaneous Application E256 of 2023)
[2024] KEHC 1747 (KLR) (Commercial and Tax) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E256 OF 2023
JWW MONG'ARE, J
FEBRUARY 27, 2024**

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES APPLICANT

AND

MAASAI MARA UNIVERSITY COUNCIL RESPONDENT

RULING

1. The Applicant/Advocate has filed a Chamber Summons application dated 23rd August 2023 pursuant to the provisions of Sections 1A, 1B & 3A of the [Civil Procedure Act](#), paragraph 11 of the [Advocates Remuneration Order](#) and all other enabling provisions of the law, seeking the following orders :-
 - i. Spent;
 - ii. Spent;
 - iii. That the Honourable Court be pleased to set aside the ruling of Hon. Githogori Bett in Misc. No E256 of 2023; Prof. Tom Ojienda & Associates v Maasai Mara University Council dated 11th August 2023 taxing the Applicant's Bill of Costs dated 31st March 2023 at a mere Kshs 450,829/=;
 - iv. That the Advocate-Client Bill of Costs dated 31st March 2023 be placed before another Deputy Registrar for re-taxation; and
 - v. That such further or other relief as this Honourable Court may deem just and expedient to grant.



2. The application is premised on the grounds set out on the face of the application and is supported by an affidavit sworn on the same day by Prof. Tom Ojienda (SC), the managing partner of the Applicant firm. In opposition thereto, the Respondent filed a replying affidavit sworn by Mercylene Njoroge, the Respondent's legal officer on 11th October 2023.
3. The Applicant's case is that they filed an Advocate-Client Bill of Cost dated 31st March 2023 against the Respondent having successfully defended their interest in Supreme Court Appl. No E005 of 2021; Dr. Wilfrida Arnodah Itolondo v Attorney General & 9 others, by successfully opposing an application for extension of time to file an appeal and stay of execution of orders of the Court of Appeal in Civil Appeal No 120 of 2019. Subsequently, the Deputy Registrar vide a ruling delivered on 11th August 2023 taxed the said Bill of Costs at Kshs 450,829/= and instruction fees at Kshs 200,000/= in complete disregard to the subject matter, importance, complexity and interest of the parties in the matter.
4. The Applicant averred that the Deputy Registrar erred in applying schedule 6 of the Advocates Remuneration Order when assessing instruction fees at Kshs 200,000/=. It further averred that she failed to take into account the subject matter which was the constitutionality of the re-appointment of the vice-Chancellors of the four institutions, and the fact that a matter filed at the Supreme Court is as complex as filed. It contended that the subject matter at the Supreme Court which is the subject of the instant reference, is similar to the subject matter in the Court of Appeal which was also subject to taxation and the instruction fee taxed at Kshs 5,000,000/= by Hon. Tanui in her ruling dated 13th April 2021.
5. The Respondent in response thereto averred that the Deputy Registrar rightfully taxed the Bill of Costs under Schedule 6 of the Advocates Remuneration Order as it was not drawn to scale. It stated that Schedule 6 clause (k)(ii) of the Advocates Remuneration Order provides that instructions fees for a matter such as the application filed at the Supreme Court should be taxed at Kshs 75,000/=. For this reason, the Taxing Officer rightfully taxed it off at Kshs 200,000/= taking into account all factors since the matter was not certified as difficult or novel by the Supreme Court. The Respondent asserted that the matter at the Court of Appeal referred to by the Applicant was heard and determined substantively unlike the matter at the Supreme Court which was simply procedural.
6. The instant application was canvassed by way of written submissions. Prof. Ojienda (SC) learned Counsel for the Applicant relied on the case of Kamunyori & Company Advocates v Development Bank of Kenya Limited [2015] eKLR and submitted that the subject matter at the Supreme Court was the validity of the holder of the office of the Vice Chancellor of the Respondent-institution and not extension of time within which to file a Notice of Appeal. This is because what was at stake was the legitimacy of the occupier of the office of the Vice Chancellor who acts as the commanding officer with regard to the operation of the Respondent.
7. Learned Counsel referred to the Court of Appeal case of Joreth Ltd v Kigano & Associates [2002] 1 E.A. 92, and contended that other than pleadings filed and Judgment of settlement, in assessing instruction fees the Taxing Offer is also expected to consider the nature and importance of the matter, the complexity of the matter, and the interest of the parties among other things. He cited the case of R. Billing & Co. Advocates v Kundan Singh Construction Limited (Now KSC International Limited) (2020)eKLR and submitted that the Taxing Officer awarded such a low figure as instruction fees as to constitute an injustice on the Applicant.
8. Dr. Mutubwa, learned Counsel for the Respondent relied on the case of Tom Ojienda & Associates Advocates v County Government of Narok (Miscellaneous Application E608 of 2019) [2021] KEHC 452 (KLR) where it was held that Schedule 6 was applicable to Advocate-Client Bill of Costs for



proceedings before the Supreme Court and submitted that in the circumstance, the Taxing Officer properly applied the provisions of paragraph 1 (k) (ii) having found that the Subject matter could not be determined from the application filed before the Supreme Court.

9. Dr. Mutubwa cited the Court of Appeal decision in the case of *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR where the court asserted that taxation of Bill of Costs is an exercise of the Taxing Officer's discretion. Therefore, the Taxing Officer who drew inference from the Supreme Court's finding that an application for extension of time to file a Notice of Appeal is a question that has been litigated on times without number, applied the correct principles in determining the Applicant's instruction fees in this case.

Analysis And Determination

10. I have considered carefully the instant application, the grounds set out therein and the affidavit filed in support thereof. I have also considered carefully the replying affidavit by the Respondent together with the written submissions by both parties. To my mind, the issue that arises for determination is "whether the application filed herein is merited."
11. It is now settled law that in a reference, the High Court can only interfere with the Taxing Master's decision where there has been an error of principle and not solely on questions of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. To this end, I am bound by the Court of Appeal's decision in the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where it was held 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."
12. It is the Applicant's contention that the Taxing Officer erred in fact and in law in assessing the instruction fees that it was entitled to. The Applicant averred that in as much as what was before the Supreme Court was an application for extension of time to lodge a Notice of Appeal, and for an order for stay of execution of the Court of Appeal Judgment, the subject of that application and its Bill of Costs was the validity of the holder of the office of the Vice Chancellor of the Respondent-Institution and not extension of time within which to file a Notice of Appeal.
13. On the other hand, the Respondent argued that what was before the Supreme Court was a mere application for extension of time to lodge a Notice of Appeal, which application is procedural in nature. And once the said application was allowed, the Respondent would then file a petition of appeal which would have been assigned a new number and would contain the subject matter of the appeal. On the issue of identifying the value subject matter of a suit, I am bound by the Court of Appeal finding in the case of *Joreth Ltd v Kigano & Associates* [2002] 1 E.A. 92, 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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."



14. It is evident from the foregoing that it is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, that a Taxing Officer is permitted to use his discretion to assess instructions fees.
15. The Applicant, in a bid to justify their allegation that the Taxing Officer awarded such a low figure as instruction fees, brought this Court's attention to the fact that that the subject matter at the Supreme Court which is the subject of the instant reference, is similar to the subject matter in the Court of Appeal which was also subject to taxation and the instruction fee taxed at Kshs 5,000,000/= by Hon. Tanui in her ruling dated 13th April 2021. However, the issue of validity of the holder of the office of the Vice Chancellor of the Respondent-institution which was the issue before the Court of Appeal in HCCA No 120 of 2019 had not yet been placed before the Supreme Court for consideration thus it cannot suffice as the subject matter of the aforementioned application.
16. In this case, the Applicant's Bill of Costs was as a result of an application seeking orders for extension of time to lodge a Notice of Appeal and stay of execution of the orders emanating from the Court of Appeal in HCCA No 120 of 2019 filed at the Supreme Court. Accordingly, I am inclined to agree with the Taxing Officer that the value of the subject matter of the said application cannot be determined from the said application.
17. This Court therefore finds that this is a proper case for the Taxing Officer to exercise her discretion in determining the instruction fees. In doing so, The Taxing Officer in this matter relied on the provisions of Schedule 6 of the Advocates Remuneration Order and held that the Applicant is entitled to a basic instruction fee of Kshs 75,000/=. From the foregoing, I am of the considered view that the nature of the application filed before the Supreme Court is not provided for in the Advocates Remuneration Order, therefore the Taxing Officer rightfully applied the provisions of Schedule 6 paragraph 1(K) (ii) which states as hereunder: -

Other Matters

To sue or defend in any case not provided for above; such sum as may be reasonable but not less than
 - i. If undefended 45,000
 - ii. If defended 75,000
18. The Court of Appeal in the Joreth case (Supra) held that in exercising her discretion, the Taxing Officer will take into consideration factors such as, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. Upon perusal of the Taxing Officer's ruling dated 11th August 2023, it is evident that she took cognizance of the fact that the Applicant was defending an application before the Supreme Court and increased the instructions fee from Kshs 75,000 as allowed under the said Schedule 6 to Kshs 200,000/=. She also indicated that the matter was neither certified difficult nor novel by the Supreme Court.
19. In light of the foregoing, this Court agrees with the Taxing Officer's finding on instructions fee and holds that in any event, an application for extension of time to file a Notice of Appeal and for Stay of Execution is neither complex nor difficult. Further, the said issues are not novel issues as they have been litigated over times without number as correctly submitted by the Respondent.
20. It is therefore this Court's finding that the Taxing Officer did not make any error in principle in determining the subject matter of the application that forms the subject matter of the Applicant's Bill of Costs and assessing instructions fee that the Applicant was entitled to.



21. The upshot is that the chamber summons dated 23rd August 2023 is bereft of merit and it is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

Ms. Msando Holding brief for Prof. Tom Ojienda(SC) for the Advocate/ Applicant

Ms. Maritim Holding brief for Dr. Mutubwa for the Respondent/Client

Amos - Court Assistant

